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and

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(Slip Op. 00–69)

STARKEY LABORATORIES, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 91–02–00132

[Defendant's motion for rehearing on classification of hearing-aid elements granted, in part.]

(Dated June 19, 2000)

Curtin & Steingart, P.A. (Ronald J. Rasley) for the plaintiff.
David W. Ogden, Acting Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Barbara S. Williams);* and Office of Assistant Chief Counsel, U.S. Customs Service *(Chi S. Choy)*, of counsel, for the defendant.

OPINION AND ORDER

AQUILINO, *Judge:* The defendant has interposed a Motion for Rehearing, Modification, and/or Reconsideration of this court's opinion and judgment herein, reported at 22 CIT ___, 6 F.Supp.2d 910 (1998), familiarity with which is presumed, and which will be referred to hereinafter as slip op. 98–44. That opinion concluded that various hearing-aid elements were properly classifiable under item 870.67 of the Tariff Schedules of the United States ("TSUS") or subheading 9817.00.9600 of the Harmonized Tariff Schedule of the United States ("HTSUS"), depending upon their times of entry, and were therefore free of duty as "articles specially designed or adapted for the use or benefit of the handicapped".

I

A fact stipulated by the parties was that the "articles in the protested entries are parts of hearing aids." 22 CIT at ___ and 6 F.Supp.2d at 911, para. 11. The crux of defendant's instant motion is stated to be that, after submission of the papers in support of the parties' cross-motions for summary judgment, which slip op. 98–44 then addressed,

> Presidential Proclamation 6821 * * * issued which expressly amended the language of subheading 9817.00.96 to include "parts

> and accessories (except parts and accessories of braces and artificial limb prosthetics) that are specially designed or adapted for use in the foregoing articles." * * *
>
> This explicit addition to * * * 9817.00.96, HTSUS, to state that the provision now includes parts establishes that the provision did not originally cover parts of articles for the handicapped, because if the provision previously included parts, there would have been no need for the amendment.

Defendant's Memorandum, p. 4 (citation omitted). In making this motion, counsel do note for the record that they

> had a continuing obligation to keep the Court informed of material developments that might assist the Court in reaching the correct result. Customs apparently did not connect the importance of the statutory change discussed in this motion to the pending litigation until the Court issued its opinion; we regret this lapse in focus. We do not know why Starkey also did not advise the Court of this development.

Id. at 3, n. 1.

A

The grant of a motion for rehearing made pursuant to CIT Rule 59, which provides, *inter alia*, for the opening of judgments and amending of conclusions of law in cases such as this, lies

> within the sound discretion of the court. *Kerr-McGee Chem. Corp. v. United States*, 14 CIT 582, 583 (1990); *Union Camp Corp. v. United States*, 21 CIT 371, 372, 963 F.Supp. 1212, 1213 (1997). The purpose of a rehearing is not to relitigate a case. *See BMT Commodity Corp. v. United States*, 11 CIT 854, 855, 674 F.Supp. 868, 869 (1987). Rather, a rehearing only serves to rectify "a significant flaw in the conduct of the original proceeding." *W.J. Byrnes & Co. v. United States*, 68 Cust.Ct. 358, 358 (1972) (footnote omitted). Importantly, the court will not disturb its prior decision unless it is "manifestly erroneous." *United States v. Gold Mountain Coffee, Ltd.*, 8 CIT 336, 337, 601 F.Supp. 212, 214 (quoting *Quigley & Manard, Inc. v. United States*, 61 C.C.P.A. 65, 496 F.2d 1214 (1974)). * * *

Volkswagen of America, Inc. v. United States, 22 CIT ____, ____, 4 F.Supp.2d 1259, 1261 (1998). *See also NEC Corp. v. Dep't of Commerce*, 24 CIT ____, ____, 86 F.Supp.2d 1281, 1282 (2000); *Union Camp Corp. v. United States*, 21 CIT 371, 372, 963 F.Supp. 1212, 1213 (1997); *Intercargo Ins. Co. v. United States*, 20 CIT 951, 952, 936 F.Supp. 1049, 1050 (1996), *aff'd*, 129 F.3d 135 (Fed.Cir. 1997).

On its face, defendant's motion appears to raise an issue of whether or not slip op. 98–44 contains a "significant flaw" or is even "manifestly erroneous". Hence, the motion should be, and it hereby is, granted—for careful consideration of defendant's above-quoted proposition that the effect of Proclamation 6821 was to establish that HTSUS subheading 9817.00.96 did not originally cover parts of articles for the handicapped.

B

The starting point for such consideration is the President's Proclamation itself, which was published at 60 Fed.Reg. 47,663 *et seq.* (Sept. 13, 1995) *sub nom. To Establish a Tariff-Rate Quota on Certain Tobacco, Eliminate Tariffs on Certain Other Tobacco, and for Other Purposes.* It states in part:

> 6. Presidential Proclamation No. 6763 of December 23, 1994, implemented the Uruguay Round Agreements, including Schedule XX, with respect to the United States and incorporated in the HTS tariff modifications necessary and appropriate to carry out the Uruguay Round Agreements. Certain technical errors, including inadvertent omissions and typographical errors, were made in that proclamation. I have decided that, in order to reflect accurately the intended tariff treatment provided for in the Uruguay Round Agreements, it is necessary to modify certain provisions of the HTS, as set forth in Annex II to this proclamation.

60 Fed.Reg. at 47,664. Paragraph (12) of Section B to that Annex II provides:

> The superior text preceding subheading 9817.00.92 which reads "Articles specially designed or adapted for the use or benefit of the blind or other physically or mentally handicapped persons:" is deleted and the text "Articles specially designed or adapted for the use or benefit of the blind or other physically or mentally handicapped persons; parts and accessories (except parts and accessories of braces and artificial limb prosthetics) that are specially designed or adapted for use in the foregoing articles:" is inserted in lieu thereof.

Id. at 47,674.

To the extent defendant's motion equates the authority of the President under Article II of the Constitution with the legislative primacy of the Congress per Article I[1], it asserts too much. Indeed, as President Taft, writing for a unanimous Supreme Court wearing his subsequent mantle of Chief Justice in the customs case *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 410 (1928), reiterated: "Congress could not delegate legislative power to the President". He referred in his opinion to the earlier decision in the customs case *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892), wherein the Court had stated

> [t]hat Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution[,]

---

[1] Defendant's supporting memorandum states unequivocally, for example, at page 4 that Proclamation 6821 "expressly amended the language of subheading 9817.00.96" and proceeds to refer to "a change in the language of a statute" and at page 5 to "subsequently enacted legislation includ[ing] language which did not appear in the earlier act" and "executive * * * change in the language of the statute", noting:

> * * * [I]t was the Congress and the President's prerogative alone * * * to decline to extend the privilege of duty-free entry to importers of parts of articles for the handicapped. Balancing these types of conflicting interests between importers and domestic manufacturers is Congress' and the President's singular responsibility * * *.

Defendant's Memorandum, p. 6, n. 2.

and also quoted from *Wilmington & Zanesville R.R. v. Commissioners*, 1 Ohio St. 77, 88 (1852), to wit:

> The true distinction, therefore, is[] between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.

See 276 U.S. at 407, 410–12. *See also* 3 Antieau & Rich, Modern Constitutional Law 442 (2d ed. 1997) ("purely legislative power cannot be delegated by Congress to the President"), citing *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935).

On the other hand, if, as the defendant maintains, the proclamation at bar is the equivalent of a statute, its counsel are hard pressed to keep this court from reading and accepting at face value the words chosen by the President, *supra*; namely, that 6821 was necessary merely to modify certain technical errors, including inadvertent omissions and typographical errors, made in Presidential Proclamation No. 6763 in implementing the Uruguay Round Agreements and incorporating in the HTSUS tariff modifications necessary and appropriate to carry out those agreements. *Compare generally* Defendant's Memorandum, pp. 6–9, *with id.* at 8:

> * * * While at first blush it appears that the "part" clause fell within Proclamation 6821's notation that the modifications were made to correct certain technical errors, inadvertent omissions, and typographical errors in Proclamation 6763, in reality the inclusion of the "parts" language here was **not** designed to correct a technical error, inadvertent omission, or typographical error. The "technical error/inadvertent omission/typographical error" clause referred solely to errors in Proclamation 6763, and Proclamation 6763 did not discuss 9817.00.96 whatsoever.

Emphasis in original; footnote omitted.

While the language of 6763 supports this last representation, this court knows of no other way to redress an omission than by adding desired words. Those added by paragraph (12) of Section B to Annex II to Proclamation 6821 (and quoted above) are clear; nowhere did the President even attempt to claim that the resultant provision is anything more than correction of a technical error or coverage of an inadvertent omission. Defendant's counsel are thus left to attempt to rely on a canon of construction applicable to acts of Congress, to wit, that a change in the language of a statute is generally construed to reflect a change of legislative intent.[2] Of course,

> canons of construction "are not in any true sense rules of law. So far as they are valid, they are what Mr. Justice Holmes called them, axioms of experience."

---

[2] *See* Defendant's Memorandum, pp. 4–5. *But see, e.g., NCNB Texas Nat'l Bank v. Cowden*, 895 F.2d 1488, 1500 (5th Cir. 1990) ("The absence of dispositive legislative history in itself counsels against a conclusion that Congress intended to change the law").

Caterpillar Inc. v. United States, 20 CIT 1169, 1177, 941 F.Supp. 1241, 1248 (1996), quoting Justice Felix Frankfurter, Some Reflections on the Reading of Statutes 27 (1947). Nonetheless, the canon which the defendant posits has been applied from time to time by the Court of International Trade[3], although many decisions

> might readily be cited where a change of language in a later enactment different from that used in a former one[] was not regarded as showing a change of intent of the part of Congress. *Andrews & Co. v. United States*, 8 Ct.Cust.Appls. 68; *Magee v. United States*, 4 Ct.Cust.Appls. 443; *United States v. Masson*, 3 Ct. Cust.Appls. 168; *United States v. Wertheimer Bros.*, 2 Ct.Cust.Appls. 515.
>
> In the *Andrews & Co.* case, *supra*, this court said:
>
> * * * It is not every change in the terms of a statute * * * that results in a change of its general purpose. The rule is one of construction merely in any case, but even as a rule of construction it has its limitations and qualifications.
>
> * * * * * * *
>
> In the enactment of a tariff law, if Congress uses different language from that used by it in previous enactments, while treating the same subject matter, it is the duty of those who are called upon to determine the meaning of its provisions to proceed primarily[] upon the theory that the change was not made by accident, but that it was intentional, and that by making such a change in expression Congress used the term in a different sense from that in which the former expression was used. * * * This rule is, however, not absolute, and does not compel the conclusion that a change in meaning was meant. It merely *indicates* such intention. * * * The rule applies where its application is not barred by more convincing considerations, and does not apply where it would lead to incongruity and confusion.

Stroheim & Romann v. United States, 13 Ct.Cust.Appls. 489, 492–93 (1926) (emphasis in original). Indeed,

> "changes in statutory language need not *ipso facto* constitute a change in meaning or effect." * * * [A] legislative body may amend statutory language "to make what was intended all along even more unmistakably clear."

NCNB Texas Nat'l Bank v. Cowden, 895 F.2d 1488, 1500 (5th Cir. 1990), quoting *United States v. Montgomery County, Md.*, 761 F.2d 998, 1003 (4th Cir. 1985), and citing *Phillips Petroleum Co. v. U.S. Envtl. Protection Agency*, 803 F.2d 545, 557–58 (10th Cir. 1986); *Callejas v. McMahon*, 750 F.2d 729, 731 (9th Cir. 1984); *Brown v. Marquette Sav. & Loan Ass'n*, 686 F.2d 608, 615 (7th Cir. 1982); and *United States v. Tapert*, 625 F.2d 111, 121 (6th Cir.), *cert. denied sub nom. Freelander v. United States*, 449 U.S. 952 (1980).

One "well recognized indication of legislative intent to clarify, rather than change, existing law is doubt or ambiguity surrounding a statute."

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[3] *E.g.*, *Schott Optical Glass, Inc. v. United States*, 11 CIT 899, 678 F.Supp. 882 (1987), *aff'd*, 862 F.2d 866 (Fed.Cir. 1988).

2B Sutherland Statutory Construction §49.11 (5th ed. 1992) (internal quotation and footnote omitted). As noted by this court in slip op. 98–44, 22 CIT at ___ and 6 F.Supp.2d at 913, n. 4, and now conceded by the defendant, Customs apparently has had such doubt. When the Service first addressed the classification of parts for hearing aids, it concluded (in Headquarters Ruling Letter 807732 (July 25, 1984)) that they were entitled to duty-free entry under TSUS item 960.15[4] as articles specially designed for use by the handicapped. Customs thereafter revisited the issue and reached a contrary conclusion in its Ruling Letter 087559 (Oct. 9, 1990) even though the statutory language remained virtually unchanged. *Compare* Slip Op. 98–44, n. 4, *ibid.*, *with* Defendant's Memorandum, p. 3, n. 1, *supra* ("Customs apparently did not connect the importance of the statutory change discussed in this motion to the pending litigation until the Court issued its opinion").

II

Be the administrative uncertainty as it has been, this court continues to have the duty "to find the *correct* result[] by whatever procedure is best suited to the case at hand." *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878, *reh'g denied*, 739 F.2d 628 (Fed.Cir. 1984)(emphasis in original); *Gen. Elec. Co.—Medical Systems Group v. United States*, 24 CIT ___, ___, 86 F.Supp.2d 1291, 1295 (2000), *appeal docketed*, No. 00–1263 (Fed.Cir. March 2, 2000). Here, that procedure, as stated above, raises the issue of whether or not slip op. 98–44 contains a "significant flaw" or is even "manifestly erroneous". In the light of the President's attempt to insure that U.S. tariffs are in compliance with the country's international agreements, and also of the foregoing discussion thereon, this court cannot answer that issue in the affirmative on either count. Indeed, if, as it has opined, "rehearing is a means to correct a miscarriage of justice"[5], the reconsideration afforded herein does not counsel that the judgment in favor of the plaintiff entered pursuant to slip op. 98–44 be set aside, and vacation thereof is therefore hereby denied.

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[4] The parties stipulated that this item was identical to TSUS item 870.67 and HTSUS subheading 9817.00.96. *See* Slip Op. 98–44, 22 CIT at ___ and 6 F.Supp.2d at 911, para. 16.

[5] *Nat'l Corn Growers Ass'n v. Baker*, 9 CIT 571, 584 (1985).

[PUBLIC VERSION]

(Slip. Op. 00–70)

AGRO DUTCH FOODS LTD., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND COALITION FOR FAIR PRESERVED MUSHROOM TRADE, DEFENDANT-INTERVENOR

Court No. 99–03–00168

[Final Determination affirmed.]

(Decided June 19, 2000)

Manatt, Phelps & Phillips (Lizbeth R. Levinson, Jeffrey S. Neeley, and *Ronald M. Wisla),* Washington, DC, for Plaintiff.

David W. Ogden, Acting Assistant Attorney General; *David M. Cohen,* Director; *Velta A. Melnbrencis,* Assistant Director, U.S. Department of Justice, Civil Division, Commercial Litigation Branch; *Robert J. Heilferty,* Of Counsel, Office of the Chief Counsel for Import Administration, for Defendant.

Collier Shannon Scott, PLLC (Michael J. Coursey and *Adam H. Gordon),* Washington, DC, for Defendant-Intervenor.

I

INTRODUCTION

WALLACH, *Judge:* At issue in this case are two aspects of the Department of Commerce, International Trade Administration's ("Commerce") *Notice of Final Determination of Sales at Less Than Fair Value: Certain Preserved Mushrooms From India*, 63 Fed. Reg. 72246 (Dep't Commerce 1998) ("*Final Determination*"), in which Commerce found that Plaintiff, Agro Dutch Foods Ltd. ("Agro Dutch") was selling its product for less than fair value (i.e. dumping) in the United States. Agro Dutch, through a Motion For Judgment On The Agency Record, pursuant to USCIT Rule 56.2, contends that Commerce erred 1) by denying it a startup cost adjustment for the construction of additional growing rooms at its plant in India, and 2) by not allocating its costs of production more heavily to its smaller mushrooms produced than its larger ones.

For the reasons set forth below, the court finds that both Commerce's denial of the startup cost adjustment and its determination that costs should be allocated evenly on all sizes of mushrooms are supported by substantial record evidence.

II

BACKGROUND

Agro Dutch grows and preserves mushrooms in India and exports them to the United States. Mushroom production begins with the preparation of composting materials in a composting yard. Those materials are gathered, aerated and processed through controlled temperature and airflow, and then plastic bags are filled with compost and mushroom spawn.

The process continues in the rooms of the growing farm. Its rooms are filled with the compost bags, and there, in the dark, under specific controlled atmospheric conditions, the mushrooms grow. The compost materials in each bag are covered with casing soil, which is made up of spent compost and ash, and the mushrooms grow up through the casing soil. When the mushrooms reach the desired size, they are picked. The picked mushrooms are blanched, processed either whole or sliced, and then canned. Response of Agro Dutch Foods Limited to Section A of the Questionnaire ("Section A Response") (March 20, 1998), at A–16 to A–21.

In 1996, Agro Dutch had forty-four growing rooms at its farm. Response of Agro Dutch Foods Limited to Sections B, C & D of the Questionnaire ("Section B, C and D Responses") (April 21, 1998), at p. 64. It began construction of an additional twenty-two rooms in 1996. *Id.* It began to use some of the rooms in February 1997, and was utilizing all twenty-two by April 1997. *Id.* Commerce denied Agro Dutch a startup cost adjustment for the addition of the new growing rooms.[1]

No distinction as to the size of the mushrooms was made in the scope of the investigation. *Final Determination* at 72246. In the arguments, the mushrooms were categorized generally as simply large and small ("button") mushrooms. The previously described growing process applies to all sizes of mushrooms, and the various sizes grow side by side in the growing rooms. *Id.* at 72254. The only difference in the growing process is that the larger mushrooms grow for a slightly longer time than the smaller ones. *Id.*; Memorandum in Support of Motion for Judgment Upon the Agency Record of Agro Dutch Food, Ltd. ("Plaintiff's Memorandum") at 8. The different sizes grow in the same bags. *Final Determination* at 72254. Agro Dutch Foods Limited Response to Supplemental Questionnaire—Section D ("Supplemental Section D Response") (June 10, 1998) at 8. Although the mushrooms grow out of the same materials, harvesting of the smaller mushrooms is a more labor-intensive task. *Final Determination* at 72254.

Some of the small mushrooms are perfectly shaped, and they are picked separately and sold as a premium product, at a higher price than the other mushrooms produced. Supplemental Section D Response at 7–8. The size of the remaining mushrooms picked depends on customer orders. Section A Response at A–20.

Agro Dutch argued that more of its growing costs should have been allocated to the allegedly premium smaller mushrooms. Plaintiff's Memorandum at 17. Commerce found instead that all growing costs were identical for all mushrooms when measured by weight, and therefore allocated growing costs per kilogram, regardless of the size of the individual mushrooms. *Final Determination* at 72254.

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[1] A startup cost adjustment is an adjustment to the cost of production of goods which is granted to a party to account for the abnormally high costs associated with the initial phase of commercial production in a new facility. 19 U.S.C. § 1677b(f)(1)(C)(ii) (1994).

III

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction under 28 U.S.C. § 1581(c) (1994). The court will uphold Commerce's determination in an antidumping investigation unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (1994). Substantial evidence is something more than a "mere scintilla," and must be enough evidence to reasonably support a conclusion. *Primary Steel, Inc. v. United States*, 17 CIT 1080, 1085, 834 F. Supp. 1374, 1380 (1993); *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 405, 636 F. Supp. 961, 966 (1986), *aff'd*, 810 F.2d 1137 (Fed. Cir. 1987).

IV

ANALYSIS

A

COMMERCE'S DENIAL OF THE STARTUP COST ADJUSTMENT IS SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD AND OTHERWISE IN ACCORDANCE WITH LAW

Any startup cost adjustment is governed by the two prongs of 19 U.S.C. § 1677b(f)(1)(C)(ii) (1994), which provides:

> ii) Adjustments shall be made for startup operations only where—
>
> I) A producer is using new production facilities or producing a new product that requires substantial additional investment, and
>
> II) production levels are limited by technical factors associated with the initial phase of commercial production.

The mechanics of the startup cost adjustment are detailed in 19 U.S.C. § 1677b(f)(1)(C)(iii) (1994).[2]

Commerce found that Agro Dutch did not fulfill either requirement. Specifically, it found that the new growing rooms did not rise to the standard of a "new production facility," and that Agro Dutch had not shown its production levels were limited by technical factors. *Final Determination* at 72253. Because both conditions must be met in order for a startup cost adjustment to be granted, Agro Dutch must show Commerce erred on both in order to have the determination set aside. *See* 19 U.S.C. § 1677b(f)(1)(C)(ii) (1994); *Pohang Iron and Steel Co., Ltd. v. United States*, 1999 WL 970743, at *5, fn 10 (CIT Oct. 20, 1999).

In this instance, Commerce's analysis of the first prong is weak. However, Commerce also found that Agro Dutch failed to meet the second

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[2] That section states:

> The adjustment for startup operations shall be made by substituting the unit production costs incurred with respect to the merchandise at the end of the startup period for the unit production costs incurred during the startup period. If the startup period extends beyond the period of the investigation or review under this subtitle, the administering authority shall use the most recent cost of production data that it reasonably can obtain, analyze, and verify without delaying the timely completion of the investigation or review. For purposes of this subparagraph, the startup period ends at the point at which the level of commercial production that is characteristic of the merchandise, producer, or industry concerned is achieved.

19 U.S.C. § 1677b(f)(1)(C)(iii) (1994).

prong, and its conclusion on that issue is supported by substantial evidence. Therefore, Agro Dutch's Motion for Judgment on the Agency Record is denied as to the startup cost adjustment.

The court addresses the second prong, the "production levels are limited by technical factors" issue, first, for it is dispositive.

1

COMMERCE'S DETERMINATION THAT AGRO DUTCH DID NOT SHOW THAT TECHNICAL FACTORS LIMITED PRODUCTION IN THE INITIAL PHASE OF COMMERCIAL PRODUCTION IS SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD AND OTHERWISE IN ACCORDANCE WITH LAW

As noted above, the second prong of 19 U.S.C. § 1677b(f)(1)(C)(ii) (1994) requires that the importer show that "production levels are limited by technical factors associated with the initial phase of commercial production." 19 U.S.C. § 1677b(f)(1)(C)(ii)(II) (1994).

Commerce and Agro Dutch are in agreement that technical problems had to be solved in the new growing rooms. Agro Dutch pointed to the installation and calibration of climate control equipment as the technical factors that had to be adjusted for the production in the new rooms to reach the production in the preexisting rooms. Plaintiff's Memorandum at 15; Supplemental Section D Response at p. 3. Commerce did not dispute this issue. *Final Determination* at 72253. Instead, it disputed whether the production levels were sufficiently limited by the installation and calibration of the equipment to meet the statute's requirement. *Id.*

Specifically, Commerce determined that "the technical factors cited by Agro Dutch did not appear to limit production levels," and that "Agro Dutch has provided insufficient evidence to support [that] claim." *Final Determination* at 72253.

Commerce applied the "production levels are limited" clause in accordance with the Statement of Administrative Action.[3] It says that units processed are to be the measure of production levels, and that "attainment of peak production levels will not be the standard for identifying the end of the startup period, because the startup period may end well before a company achieves optimum capacity utilization." SAA at 166, 1994 U.S.C.C.A.N. at 3864.[4]

At oral argument, the Government clarified the term "units processed." Counsel explained that Commerce meant information on how many units Agro Dutch set out to produce. In other words, how much input was used during the period of investigation (POI). Agro Dutch

[3] Statement of Administrative Action of the Uruguay Round Agreements Act, accompanying HR 103–5110, *reprinted in* 1994 U.S.C.C.A.N. 3773 ("SAA").

Congress expressly approved the SAA:

> Statement of administrative action. The statement of administrative action approved by the Congress under section 3511(a) of this title shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application.

19 U.S.C. § 3512(d)(1994). *See Delverde, SrL v. United States*, 989 F. Supp. 218, 230, n.18 (CIT 1997), *vacated on other grounds*, 202 F.3d 1360 (Fed. Cir. 2000).

[4] While this statement is in the context of defining the period of the startup, it is just as relevant to whether there is a startup in the first place.

provided evidence of total output in kilograms and yield rates expressed in percentages (both types of evidence referred to as "yields" or "output yields" by Agro Dutch). It provided no evidence of its units processed.

In evaluating the evidence that was provided, Commerce first found that Agro Dutch did not give data on its units processed. It then found that Agro Dutch had failed to even establish a benchmark against which Commerce could evaluate the evidence it did receive. *Final Determination* at 72254. Commerce concluded that the evidence provided was not useful, and that without either evidence of units processed or evidence sufficient to set a benchmark against which to compare the total output and yield rates provided, Agro Dutch could not support its claim of limited production levels. *Final Determination* at 72253–4.

Agro Dutch contends that instead of units processed, Commerce should have applied a test based on the mushroom output yields submitted into evidence. It argues that a yield-based test is perfectly reasonable for determining limited production levels, and that its output and yield rates in the new rooms during the claimed startup period were significantly lower than in the preexisting rooms. Plaintiff's Memorandum at 15–16. Agro Dutch defends its test by stating that "[a] more efficient production process * * * will inevitably lead to a higher production quantity based on cultivation of the same area," and that absent another explanation, Commerce should find that low output and low yield rates are due to startup operations. *Id.*

A

COMMERCE APPLIED THE STATUTE ACCORDING TO CONGRESS'S UNAMBIGUOUSLY EXPRESSED INTENT

The court reviews Commerce's application of the statute according to the two-part test established in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984).[5] The court first asks "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If it has, and if its intent is clear, the court and Commerce must give effect to that unambiguously expressed intent. *Id.* at 842–43. If it has not, Commerce has the discretion to interpret the statute, and its interpretation will be upheld so long as it is reasonable. *Id.* at 843.

The statute itself does not define "production levels." The court must thus use standard tools of statutory construction, including legislative history, to determine whether Congress's intent is judicially ascertainable. *Timex V.I., Inc. v. United States*, 157 F.3d 879, 881–82 (Fed. Cir. 1998). Congress unambiguously expressed its intent in the SAA where it stated that "[p]roduction levels will be measured based on units processed."[6] SAA at 166, 1994 U.S.C.C.A.N. at 3864. The agency must give

[5] The court notes that the Supreme Court's recent decision in *Christensen v. Harris County*, 120 S.Ct. 1655, 2000 U.S. LEXIS 3003 (May 1, 2000), did not affect the court's application of *Chevron* in this case. Here the court does not reach the issue of deference dealt with in *Christensen*.

[6] While this statement is not made in direct reference to the issue of limited production levels, the court finds it persuasive.

effect to this clear statement. *Chevron*, 467 U.S. at 843. Here, Commerce did give effect to the language when it stated that the SAA as "direct[ed] the Department [of Commerce] to examine the number of units processed as a primary indicator of production levels in determining the end of the start-up period." *Final Determination* at 72254.

Agro Dutch contends that total output and yield rates provide better measures of production levels than a test based on units processed because "[a] more efficient production process (i.e. a higher yield) will inevitably lead to a higher production quantity based on cultivation of the same area." Plaintiff's Memorandum at 15–16. Agro Dutch claims this test is consistent with Congressional intent, and cites to the Congress's statement in the SAA which follows the previously quoted "units processed" clause, which states, "To the extent necessary, Commerce will also examine other factors, including historical data[.]" SAA at 166, 1994 U.S.C.C.A.N. at 3864. Agro Dutch argues that total output and yield rates fall under "other factors," and that Commerce therefore should consider them. Plaintiff's Memorandum at 16.

However, such an application of Congress's language would be contradictory to another clause of the SAA where Congress said, "[C]onsistent with the basic definition of a startup situation, Commerce will not extend the startup period so as to cover improvements and cost reductions that may occur over the entire life cycle of a product." SAA at 166, 1994 U.S.C.C.A.N. at 3864. If Congress did not intend to include improvements in efficiency in the startup period, and the way such improvements would be shown would be in increased output and higher yield rates (as Agro Dutch specifically argues in its Plaintiff's Memorandum at 15–16), then Congress did not endorse such evidence as support for "limited" production levels for startup cost adjustments. Therefore, given Congress's stated intent, Agro Dutch's argument cannot prevail.

For the above reasons, the court finds that Commerce's application of 19 U.S.C. § 1677b(f)(1)(C)(ii) (1994) is in accord with Congressional intent.

B

COMMERCE'S CONCLUSION THAT AGRO DUTCH DID NOT MEET THE "LIMITED PRODUCTION LEVELS" TEST IS SUPPORTED BY SUBSTANTIAL RECORD EVIDENCE

Under the units processed test, Commerce's conclusion that Agro Dutch did not show its production levels were limited is supported by substantial record evidence.

When asked to "Describe and quantify how you determined your company's commercial production level," Supplemental Questionnaire—Section D ("Supplemental Section D Questionnaire") (May 20, 1998) at 3, Agro Dutch submitted only total output information, *Final Determination* at 72254; Supplemental Section D Response, at Ex. D-Supp.–2. Agro Dutch did not submit to Commerce any evidence of its

units processed,[7] or any evidence of a benchmark against which to evaluate those total output figures. *Final Determination* at 72254.

Under the units processed test, evidence of Agro Dutch's output was not useful. Without evidence of the units processed, Commerce was unable to evaluate Agro Dutch's production levels. *Final Determination* at 72254. This lack of information on the record precluded Commerce from applying the statute as Congress intended.

Commerce then evaluated the evidence it did have before it and found that the evidence Agro Dutch did submit was not useful because Agro Dutch had not established a benchmark to show that its production levels were limited. Commerce was provided with production figures for the entire facility for 1996 and 1997, but Commerce could not know if these figures reflected "limited production levels" without other evidence to which it could compare the data.

Therefore, Commerce's finding that Agro Dutch did not show its production levels were limited is supported by substantial record evidence.

I.

INCREASED OUTPUT LATER IN THE YEAR FAILED TO ESTABLISH A BENCHMARK FROM WHICH COMMERCE COULD SEE IF PRODUCTION WAS "LIMITED"

Agro Dutch argues that the output during the claimed startup period was far less than output achieved in the second half of the year, and that it did not achieve "normal production levels" until after the claimed startup period ended. Plaintiff's Memorandum at 14. Agro Dutch provided evidence of the total output for the entire plant for each month of the years 1996 and 1997. Section B, C and D Responses, Ex. D–1; Supplemental Section D Response, Ex. D-Supp.–2.

Commerce found that this was insufficient information to support a finding of limited production levels.[8] *Final Determination* at 72254. Commerce needed a benchmark against which to compare this data in order for it to be useful at all. It asked for a benchmark when it requested that Agro Dutch "Describe and quantify how you determined your company's commercial production level." Supplemental Section D Questionnaire, at 1. Instead of providing an explanation of what the "commercial production level" was, Agro Dutch submitted a chart of to-

[7] Agro Dutch has made no claim that it did submit evidence of units processed.

[8] Agro Dutch argues that Commerce's explanation that it did not have evidence of production levels limited by technical factors is simply not true, because Agro Dutch "fully described the technical problems with air-conditioning and ventilation systems, which resulted in below average yields during the start-up period[.]" Plaintiff's Memorandum at 15. This argument misses the point that both technical factors *and* limited production levels must be shown. Commerce does not dispute that evidence of the technical factors was submitted on the record. It found the record lacking in evidence of limited production levels. *Final Determination* at 72254.

tal production output. Supplemental Section D Response at 3 and Ex. D-Supp.–2.[9]

The evidence only gave Commerce the opportunity to compare total plant output with the new rooms to production prior to their being built. This information did not suffice as a benchmark because the efficient production of the preexisting rooms is not necessarily a "normal" level, and so the comparison was not useful. As Commerce stated in its *Final Determination*, "under a comparative yield approach, a respondent may never leave the start-up phase because it may never reach comparative yields." *Final Determination* at 72254.

While Commerce did not request a specific item of information, Commerce noted that Agro Dutch did not provide "information, for example, on historical production or capacity usage at its facilities to serve as a benchmark for measuring commercial production levels during the POI."[10] *Final Determination* at 72254.

Since the evidence of increased production output submitted by Agro Dutch does not provide Commerce with any benchmark to use in its analysis, nor does it provide any information regarding units processed to allow Commerce to apply the statute, it does not demonstrate to the court that Commerce erred in its finding that this evidence did not show limited production levels in the new growing rooms.

II

COMMERCE DID NOT MISINTERPRET AGRO DUTCH'S ARGUMENT THAT IT DID NOT ACHIEVE "NORMAL" PRODUCTION LEVELS

Agro Dutch further claims that the rejection of the limited production levels argument was in error because Commerce allegedly misinterpreted Agro Dutch's argument as meaning it had failed to reach peak

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[9] On its face, the excerpted question is clear. Furthermore, the structure of the question highlights that total production figures were not being requested by this particular part of the question. The question reads:

> 3. Provide monthly 1996 and 1997 figures for the quantity of mushrooms produced, quantity of mushrooms purchased, the dry weight quantity of mushrooms entering the canning process, the quantity of fresh mushrooms produced, and the total quantity sold as scrap.
>
> In addition, provide the following information:
>
> a. Describe and quantify each technical factor that prevented the harvesting or canning of mushrooms during the start-up period.
>
> b. Describe and quantify how you determined your company's commercial production level.
>
> c. Explain how you determined tell [sic] that other factors did not contribute to the lower production factors.

Supplemental Section D Questionnaire at 1. It should have been clear that subparts (a), (b) and (c) were requesting information other than that requested in the beginning of the question, because it asked for responses to the subparts "in addition" to the earlier requested information.

[10] Agro Dutch argues that Commerce did not specifically request historical production information, that Agro Dutch would have provided it had Commerce so requested, and that Agro Dutch should not be penalized for not providing it nor "expected to anticipate every item of information that [Commerce] might find relevant." Plaintiff's Reply Brief at 5.

In the court's view, Agro Dutch misunderstood Commerce. Commerce needed a benchmark. Commerce does not say that it asked for but did not receive historical information, nor does it say that historical information was absolutely required. It says that it provided no information to serve as a benchmark, and that information such as historical production and capacity usage may have served that purpose.

Furthermore, Commerce was not required to seek out the specific information it may have been able to use to establish such a guideline, especially since several types of information would have sufficed. The burden of creating an adequate record lies with Agro Dutch, not with Commerce. *Tianjin Machinery Import & Export Corp. v. United States*, 16 CIT 931, 936, 806 F. Supp. 1008, 1015 (1992). It is Commerce's burden to verify the information it uses in its determination, *id.*, but it is not required to seek out specific pieces of data to help the respondent. In this case, Commerce requested information to set the benchmark when it asked Agro Dutch how it determined its "commercial production level," and Agro Dutch did not provide enough information. It was not Commerce's obligation to then request specific pieces of information that may or may not have aided Agro Dutch's claim. *Nation Ford Chem. Co. v. United States*, 21 CIT 1371, 1374, 985 F. Supp. 133, 136 (1997) ("[Commerce] had no duty to seek out additional information not submitted by the parties").

production levels, as opposed to "normal" production levels. Plaintiff's Memorandum at 14. Commerce found that "[a]lthough production levels at the growing houses in question were not at their peak levels, Agro Dutch was able to produce sizable quantities of mushrooms." *Final Determination* at 72253.

Agro Dutch argues that it did not simply claim it failed to reach peak production, but that it fell well short of peak levels even after the claimed startup period ended and did not achieve "normal" production levels until three months after the end of the claimed startup period. Plaintiff's Memorandum at 14.

It does not appear to the court that Commerce misunderstood Agro Dutch's argument. Commerce found that it did not have enough evidence to determine whether production levels were limited. *Final Determination* at 72254. It agreed that the levels were below peak, but it was unable to determine if the "sizable quantities" of mushrooms produced were limited or normal production quantities. *Id.* at 72253. Although Agro Dutch's yields were below peak, it does not necessarily follow that the production levels were limited. *See* SAA at 166, 1994 U.S.C.C.A.N. at 3864. Without a valid benchmark, Commerce could not evaluate the yields properly.

Therefore, the court finds no misunderstanding on Commerce's part, and no reason to disturb its finding that it lacked sufficient evidence of limited production levels.

III

AGRO DUTCH MISUNDERSTOOD COMMERCE'S STATEMENT THAT PRODUCTION LEVELS AT THE PREEXISTING FACILITY WERE NOT CLAIMED TO BE LIMITED

Finally, Agro Dutch claims that Commerce erred when it stated that "Agro Dutch made no claim that commercial production levels at the preexisting operations were limited by any technical factors associated with the new capacity." *Final Determination* at 72253; Plaintiff's Memorandum at 13. This statement was made in the context of Commerce rejecting Agro Dutch's claim of limited production levels. *Final Determination* at 72253. Agro Dutch argues that "[Commerce] cites to no statutory or logical reason that an *old* facility must be limited for technical reasons for a *new* facility to qualify for a start-up claim." Plaintiff's Memorandum at 13 (emphasis in original).

Agro Dutch misunderstood Commerce. Commerce found that it did not have evidence that production levels in the new growing rooms were limited. *Final Determination* at 72253–4. This statement about the preexisting rooms was merely an additional note that no claim was made that the rest of the production site had limited production levels. *Id.* at 72253. It is clear from a reading of the *Final Determination* that Commerce's point was simply that it did not have an alternative argument before it that production levels in the plant as a whole were limited.

Therefore the court holds that as to the second prong of the startup cost adjustment test, Commerce's determination is supported by substantial evidence in the record and otherwise in accordance with law.[11]

2

WHETHER COMMERCE'S DETERMINATION THAT THE ADDITIONAL GROWING ROOMS DID NOT CONSTITUTE A "NEW FACILITY" IS SUPPORTED BY SUBSTANTIAL EVIDENCE NEED NOT BE REACHED DUE TO THE CONCLUSION ABOVE, BUT COMMERCE'S LACK OF REASONING AND MATHEMATICAL ERROR CAST DOUBT ON ITS CONCLUSIONS

Remand on the startup cost adjustment is denied due to the court's conclusion above. However, the court finds it appropriate to briefly address the "new facility" prong of 19 U.S.C. § 1677b(f)(1)(C)(ii) (1994) for reasons of judicial economy.[12]

The first prong of the statute states that startup cost adjustments are only to be made if "a producer is using new facilities or producing a new product that requires substantial additional investment." 19 U.S.C. § 1677b(f)(1)(C)(ii)(I) (1994). Agro Dutch argues that the new growing rooms constitute a "new facility." Plaintiff's Memorandum at 12.

Agro Dutch had a total of forty-four growing rooms in 1996 when it began constructing an additional twenty-two. Section B, C and D Responses, at Sec. D, p. 64. Commerce found that the expansion "by one third" did not "rise[] to the level of expansion contemplated by the language in the SAA." *Final Determination* at 72253. Agro Dutch contests this finding by alleging, inter alia, a) that Commerce made a mathematical error because the expansion was an addition of one-half, not one-third, of the capacity of the plant; b) that an increase in capacity by one-half is a "major undertaking," the term used in the SAA; and c) that a new building with a new air conditioning system constitutes a "new facility." Plaintiff's Memorandum at 2.

Commerce's interpretation of this provision of the statute is entitled to *Chevron* deference. The first question is "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842.

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[11] The court notes Plaintiff's concern that upholding Commerce's determination will lead to the "absurd result" that "if the number of units processed is low because of a lack of orders, a company will get the start-up adjustment * * * [but] if the company has more orders and processes more goods, even at a yield rate that, due to technical factors associated with the start-up phase of production, is a small fraction of the normal rate, it is denied the start-up adjustment." Plaintiff's Memorandum at 16.

However, the statute specifically says that "[i]n determining whether commercial production levels have been achieved, [Commerce] shall consider factors unrelated to startup operations that might affect the volume of production processed, such as demand, seasonality, or business cycles." 19 U.S.C. § 1677b(f)(1)(C)(ii) (1994). Therefore, if the number of units processed is low due to a lack of orders, it will not be an indicator of startup production.

Furthermore, the statute requires more than simply a low number of units processed. It also requires a new product or new facility, and technical factors limiting production. So, even if a company satisfied the low number of units processed aspect of the statute, it would need to show more in order to qualify for the startup cost adjustment.

Plaintiff's concerns are therefore unfounded.

[12] This issue is rarely heard before the Court of International Trade, and here it has been raised, fully briefed and argued. In prior antidumping investigations, Commerce's reasoning on the issue of what constitutes a "new facility" has been scant. Only one of those cases has resulted in a published opinion of this court. *See Pohang Iron and Steel Co, Ltd. v. United States*, 1999 WL 970743 (CIT). In light of Commerce's lack of reasoning in this case and in others, the court finds it appropriate to make use of the current posture, having the issue fully briefed and argued before it, to analyze the issue here.

"New facility" is not defined in the statute. Commerce is given guidance by the legislative history where in defining "startup" in the SAA, Congress states:

> Mere improvements to existing products or ongoing improvements to existing facilities will not qualify for a startup adjustment. Commerce also will not consider an expansion of the capacity of an existing production line to be a startup operation unless the expansion constitutes such a *major undertaking* that it requires the construction of a new facility and results in a depression of production levels due to technical factors associated with the initial phase of commercial production of the expanded facilities.
>
> "New production facilities" includes the substantially complete retooling of an existing plant. Substantially complete retooling involves the replacement of nearly all production machinery or the equivalent rebuilding of existing machinery.

SAA at 166, 1994 U.S.C.C.A.N. at 3864 (emphasis added).

Commerce did not analyze this guiding language at all in its analysis, nor did it provide any details of its reasoning.[13] The only explanation that Commerce gave was its statement that "we do not think that the expansion of capacity by one third rises to the level of expansion contemplated by the language in the SAA." *Final Determination* at 72253.

This explanation might have been sufficient had Commerce been correct in its factual statement regarding the expansion. However, the "one-third" expansion was actually, based on the numbers of rooms, a

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[13] This issue is one undeveloped by administrative practice or case law. Although Congress left the details up to Commerce, Commerce has not specifically defined in its regulations, its *Final Determination* in this case, or its rulings in any other cases, what is necessary to meet the requirements for a startup. Commerce has never articulated the standards it applies.

A representative example of a startup cost adjustment that has been granted in the past is *Notice of Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke the Antidumping Duty Order: Brass Sheet and Strip from the Netherlands* ("*Dutch Brass*"), 65 Fed. Reg. 742 (Dep't Commerce 2000). There, the startup cost adjustment was granted for the wholesale replacement of an old ring casting mill. However, Commerce's reasoning is virtually non-existent. The new strip casting mill was considered by Commerce to be a "new facility" because it was a "wholesale replacement" of the old mill, but no elaboration was given. *Id.* at 744.

Other rulings by Commerce on this issue are denials of the startup cost adjustment. Some admit that the construction for which a startup cost adjustment is claimed is a "new facility," and deny the adjustment on other grounds, *Notice of Final Determination of Sales at Less Than Fair Value: Foam Extruded PVC and Polystyrene Framing Stock From the United Kingdom*, 61 Fed. Reg. 51411, 51420 (Dep't Commerce 1996) (assuming that there was a new facility without ever discussing the issue); *Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate From Canada: Preliminary Results of Antidumping Duty Administrative Reviews and Intent To Revoke in-Part*, 63 Fed. Reg. 37320, 37325 (Dep't Commerce 1998) (stating only that Commerce agreed that there was a "new facility"); *Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Static Random Access Memory Semiconductors From Taiwan*, 62 Fed. Reg. 51442, 51448 (Dep't Commerce 1997) (stating that a new facility existed without giving any explanation as to why the claimed construction qualified as a "new facility"), and others deny the existence of "new facilities," some with little or no explanation, *Notice of Final Determination of Sales at Not Less Than Fair Value: Collated Roofing Nails From Korea*, 62 Fed. Reg. 51420, 51426 (Dep't Commerce 1997) (relocation of facility without replacement of equipment is not enough); *Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products From Korea: Final Results of Antidumping Duty Administrative Reviews*, 64 Fed. Reg. 12927, 12950 (Dep't Commerce 1999) (one new production line in a large production plant does not constitute a substantial modification to meet the statute); *Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products From Korea: Final Results of Antidumping Duty Administrative Reviews*, 63 Fed. Reg. 13170, 13200 (Dep't Commerce 1998) ("*Korean Steel*") (no convincing evidence given for why one production line is a "new facility" by itself).

This court dealt in depth with the "new facility" issue in *Pohang* (an appeal from Commerce's ruling in *Korean Steel*, noted above). In that case, the steel producer alleged that installation of a new production line in its existing plant qualified for a startup cost adjustment. Commerce denied the adjustment, and the court affirmed.

Commerce again provided very little reasoning for its conclusion, however. It stated that the new lines produced merchandise similar to that produced on the older lines, and that the manufacturer did not provide any "convincing evidence that the new line should be considered 'new production facilities' or 'the substantially complete retooling of an existing plant.'" *Korean Steel*, 63 Fed. Reg. at 13200.

In its review, the court pointed out these same reasons for the denial, and further stated that the expending of "considerable costs" alone did not make the new construction a new facility. *Pohang* at *5.

50% increase in capacity.[14] Since Commerce was mistaken as to that underlying fact, its conclusion that it is not enough is inherently questionable. This is particularly so in light of the lack of detailed reasoning. Because Commerce also failed to explain its interpretation of the term "new facility," the court could not even determine if the construction of the statute was reasonable.[15]

However, the court does not need to decide whether Commerce's interpretation is reasonable or if its conclusion is supported by substantial record evidence, because Commerce's finding that Agro Dutch had not satisfied the "production levels limited by technical factors" prong was based on a permissible construction of the statute and was supported by substantial evidence on the record. There is therefore no need for a holding on this issue.[16]

B

COMMERCE'S PARTIAL REJECTION OF AGRO DUTCH'S COST ALLOCATION METHODOLOGY AND DETERMINATION THAT MATERIALS AND OTHER NON-PICKING COSTS SHOULD NOT BE ALLOCATED MORE HEAVILY TO SMALL MUSHROOMS THAN LARGE MUSHROOMS IS SUPPORTED BY SUBSTANTIAL RECORD EVIDENCE AND OTHERWISE IN ACCORDANCE WITH LAW

In the course of any antidumping investigation, normal value must be determined. 19 U.S.C. § 1677b(a) (1994). Normal value is roughly the price at which the subject goods are sold in the exporting company's home market. *Id.* If Commerce has "reasonable grounds to believe or suspect" that the foreign product has been sold in the home country at less than the cost of production ("COP"), then Commerce must calculate the COP to determine if such sales have indeed occurred. 19 U.S.C. § 1677b(b)(1) and (b)(3) (1994). The importance of the COP calculation is that if Commerce finds that the exporter sold goods in the home market for less than the COP, and if such sales were made over an extended period of time or in substantial quantities, those sales may be excluded

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[14] Prior to building the new growing rooms here at issue, Agro Dutch had forty-four growing rooms. Fifty percent of forty-four is twenty-two. When they finished the new growing rooms, they had added twenty-two, or fifty percent, for a total of sixty-six. In its *Final Determination*, Commerce refers to the expansion as being by one-third. Obviously, when the construction was complete, the new growing rooms comprised one-third of the total number of growing rooms, but the total expansion was fifty percent.

That analysis assumes that the growing rooms were of equal size. At oral argument, the parties were unable to point to any evidence of record regarding the size of the growing rooms, either preexisting or newly constructed. Accordingly, there is no way for this court to determine the actual size ratio between existing and new space.

[15] At oral argument, both parties addressed the "new facility" issue. The Government advanced the argument that the subject merchandise is *preserved* mushrooms, and that the growing rooms produce fresh mushrooms as only a part of the preserved mushroom production process. Therefore, the Government argued, the fresh mushroom production area could not be considered a "facility" for purposes of a preserved mushroom review. The court finds this argument persuasive, but notes that this post hoc rationalization would not suffice if the court needed to determine if Commerce's construction of the statute was reasonable.

[16] The court does note, however, that Agro Dutch's argument that "[a] new building, with a new type of air-conditioning equipment, that adds 50 percent to the capacity of a company, is a new facility." Plaintiff's Memorandum at 13, is as jejune as Commerce's denial of the "new facility." In arguing that Commerce's denial was based on faulty math, Agro Dutch says, "DOC provides no explanation whatsoever as to why an increase of 50 percent (or even of one-third) is so small that it must result in a rejection of a start-up adjustment." Plaintiff's Memorandum at 14. While this is true, it would be no more satisfactory for Commerce to state that a 50% increase is enough without further elaboration (as illustrated by the cases cited above).

from the calculation of normal value. 19 U.S.C. § 1677b(b)(1)(B) and (b)(2)(c)(i) (1994).[17]

Whenever possible, in calculating the COP, allocation of costs should follow the methodology employed by the producer in its books. 19 U.S.C. § 1677b(f)(1)(A) (1994).[18] Agro Dutch, however, did not have a cost accounting system. Section B, C and D Responses, at 64; *Final Determination* at 72254; Plaintiff's Memorandum at 18. Therefore, it was necessary for Agro Dutch to establish a cost allocation methodology for purposes of this investigation. *Final Determination* at 72254. The system Agro Dutch established allocated both picking and non-picking costs depending on the size of the mushrooms produced, with small mushrooms being allocated a higher proportion of all costs than the larger mushrooms. *Id.*

Commerce accepted Agro Dutch's argument that small mushrooms were more expensive in terms of harvesting labor cost. *Id.* Commerce did not, however, accept that non-picking, meaning materials, non-picking labor and overhead, costs were higher for small mushrooms than for large. *Id.* Commerce found that for non-picking costs, "the cost per kilogram of growing a large or small mushroom is identical." *Id.* Accordingly, Commerce allocated non-picking costs evenly by kilogram of mushrooms, regardless of size. *Id.* Commerce gave several reasons for its conclusion. The facts underlying its reasons came directly from Agro Dutch's questionnaire responses, and Agro Dutch does not dispute any of Commerce's articulated reasons.

First, Commerce said, "there is very little growing time difference" between a large mushroom and a small one. *Id.* Second, it found that "different size mushrooms grow side-by-side, incurring the identical costs (*i.e.*, materials, non-picking labor, and overhead)." *Id.* Third, Commerce stated that weight is the measure used in the business of mushrooms. *Id.* Agro Dutch tracks its mushrooms by weight and not by "number of mushrooms, estimated yields, or by relative sales value," and sells them by weight. *Id.* In other words, Agro Dutch does not normally track its mushrooms by size *and* weight, but simply by overall weight.

Agro Dutch makes a factual argument that in the calculation of its COP, Commerce should have allocated all of Agro Dutch's production

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[17] The consequence of such exclusion is that the normal value is higher than it would otherwise be, which means that U.S. sales are more likely to be at less than fair value. This increases the likelihood of a dumping margin being imposed, and increases the size of that margin. If, however, the COP is decreased due to the way costs are allocated, fewer sales in the home market may be at less than COP. Consequently, fewer sales may be excluded (if any), leading to a lower normal value because more low-end (but above COP) sales would be included in the calculation of normal value. *See* Raj Bhala, *International Trade Law: Cases and Materials* 654 (1996) ("It is an arithmetic fact that the exclusion raises the average and, therefore, increases the likelihood of finding, and size of, a dumping margin.")

[18] The statute reads, in pertinent part:

> (f) Special rules for calculation of cost of production and for calculation of constructed value
>
> For purposes of subsections (b) and (e) of this section.—
>
> (1) Costs
>
> (A) In general
>
> Costs shall normally be calculated based on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the generally accepted accounting principles of the exporting country (or the producing country, where appropriate) and reasonably reflect the costs associated with the production and sale of the merchandise.

costs more heavily on the smaller mushrooms produced than on the larger mushrooms. Plaintiff's Memorandum at 8. To support this argument, Agro Dutch points to a demonstration given at verification that was intended to show that more material went into each kilogram of small mushrooms than into each kilogram of large. *Id.* at 9. In the demonstration, all of the small mushrooms from three growing bags, then all of the large mushrooms from another set of three growing bags, were picked. Six times as many kilograms of large mushrooms as small mushrooms were produced by three bags. *Id.* at 10.

However, this demonstration is far from conclusive evidence. Facially, it appears to support Agro Dutch's position. However, other record evidence casts doubt on its validity. For example, in Agro Dutch's Supplemental Section D Response at 8, it illustrates that mushrooms do not grow at the same rate, so bags normally used in production do not produce uniform small or large mushrooms, as the bags used at the demonstration did. Agro Dutch's response reads: "These [button] mushrooms have been smothered by surrounding mushrooms in the compost bag that have grown to their maximum size. These mushrooms are picked with other mushrooms that have reached peak size." *Id.* In other words, the large and small mushrooms are produced at the same time of the same bags.

In another response, Agro Dutch further casts doubt on its demonstration. It says, "In actuality, each size and grade of mushroom can be and often is picked from the same bag on the same day." Section B, C, and D Responses at 66.

The standard of review requires "substantial evidence on the record," 19 U.S.C. § 1516a(b)(1)(B)(i) (1994); it does not require that *all* evidence be in favor of Commerce's decision, *Cinsa, S.A. de C.V. v. United States*, 21 CIT 341, 343, 966 F. Supp. 1230, 1233 (1997) (stating "substantial evidence is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence" (citations and punctuation omitted)), and it appears to the court that Agro Dutch's demonstration is far from conclusive evidence in Agro Dutch's favor. It is certainly insufficient to overcome the substantial record evidence identified by Commerce and uncontested by Agro Dutch.

Furthermore, Agro Dutch has not shown that the conclusion Commerce reached was unreasonable, which is the threshold showing required. *Chevron* at 843. At most, Agro Dutch has identified record evidence which might point to a different allocation of costs. Such a showing is insufficient, however, to undermine Commerce's findings. *Cinsa, S.A.*, 21 CIT at 343, 966 F. Supp. at 1233. Commerce has not committed error

by not addressing this demonstration in the *Final Determination*. Remand of this matter for further consideration is unnecessary.[19]

The court finds that the reasons set forth by Commerce in the *Final Determination* are supported by substantial record evidence. Therefore, the court will not disturb Commerce's finding, and affirms Commerce's cost allocation determination.

V

CONCLUSION

For the foregoing reasons, the court finds that Commerce correctly denied the startup cost adjustment, as its conclusion that Agro Dutch did not meet the second prong of the two-part test was supported by substantial record evidence, and that Commerce's conclusion that costs should not be allocated more heavily on the small than the large mushrooms was also supported by substantial record evidence.

The court therefore affirms Commerce's *Notice of Final Determination of Sales at Less Than Fair Value: Certain Preserved Mushrooms From India*, 63 Fed. Reg. 72246 (Dep't Commerce 1998) in its entirety.

(Slip Op. 00–71)

BERGERAC, N.C., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND HERCULES, INC., DEFENDANT-INTERVENOR

Court No. 98–10–03045

Plaintiff, Bergerac, N.C. (Bergerac), moves for Judgment Upon An Agency Record pursuant to U.S. CIT R. 56.2, challenging the U.S. Department of Commerce's (Commerce) refusal to exclude certain home market sales as sample sales outside the ordinary course of trade in the final results of Commerce's antidumping administrative review in *Industrial Nitrocellulose From France*, 63 Fed. Reg. 49,085 (Sept. 14, 1998) (final results of antidumping administrative review) *(Final Results)*. In making its final determination, Commerce found Bergerac had not met its burden of proof in demonstrating that the sales in question were outside the ordinary course of trade as required by statute. Defendant, United States, and defendant-intervenor, Hercules, Inc., oppose the motion stating the challenged determination is supported by substantial evidence and is otherwise in accordance with law.

Held: Plaintiff's motion for Judgment Upon An Agency Record is denied. The Court finds Commerce's *Final Results* are supported by substantial evidence on the record and are otherwise in accordance with law and sustains them in their entirety. This action is dismissed.

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[19] The court will not reweigh the evidence placed before Commerce, *Timken Co. v. United States*, 12 CIT 955, 962, 699 F. Supp. 300, 306 (1988) ("It is not within the Court's domain either to weigh the adequate quality or quantity of the evidence. * * *") or substitute its own judgment for the agency's if the conclusion reached by the agency is reasonable and supported by substantial evidence in the record. *Ceramica Regiomontana, S.A.*, 10 CIT at 404–5, 636 F. Supp. at 966 ("As long as the agency's methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency's conclusions, the court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology.")

(Dated June 21, 2000)

Ablondi, Foster, Sobin & Davidow, P.C. (James Taylor, Jr.), Washington, D.C., for plaintiff.

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OPINION

CARMAN, *Chief Judge:* This matter is before the Court on plaintiff's, Bergerac, N.C. (Bergerac), motion for Judgment Upon An Agency Record pursuant to U.S. CIT R. 56.2. Plaintiff asserts the U.S. Department of Commerce's (Commerce) refusal to exclude certain home market sales as sample sales outside the ordinary course of trade in the final results of Commerce's antidumping administrative review in *Industrial Nitrocellulose From France*, 63 Fed. Reg. 49,085 (Sept. 14, 1998) (final results of antidumping administrative review) (*Final Results*), is not supported by substantial evidence and is not otherwise in accordance with law. Plaintiff requests this Court remand the action to Commerce with instructions to exclude Bergerac's home market sales of priced samples from the margin calculation and to articulate meaningful standards from which a respondent may discern whether its home market sample sales will be regarded as sales in the ordinary course of trade. Defendant, United States, and defendant-intervenor, Hercules, Inc. (Hercules), oppose the motion stating the *Final Results* are supported by substantial evidence and are otherwise in accordance with law.

This Court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (1994). For the reasons which follow, plaintiff's motion for Judgment Upon An Agency record is denied, Commerce's *Final Results* are sustained in their entirety, and this action is dismissed.

BACKGROUND

On September 25, 1997, Commerce initiated an administrative review of antidumping duty orders and findings of certain industrial nitrocellulose from, among other countries, France. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 62 Fed. Reg. 50,292 (Sept. 25, 1997). Bergerac is a producer in France of industrial nitrocellulose, the merchandise at issue in the review. In response to Commerce's initial questionnaire requesting detailed information on U.S. and home market sales, plaintiff claimed it "often sends samples to customers for approval" and that "[s]ample sales * * * are outside the ordinary course of trade * * *." (Bergerac Questionnaire Responses, Plaintiff's Appendix Pursuant to CIT Rule 56.2 (App.), Public Document (Pub. Doc.) 14, at A–12 and B–12.)

Commerce requested in a supplemental questionnaire information concerning Bergerac's "zero-value transactions (samples and prototypes)" to determine whether the reported transactions "were outside

the ordinary course of trade." (Bergerac Supplemental Questionnaire, App., Pub. Doc. 20, at 17.) Specifically, Commerce requested Bergerac:

> a) describe how the orders for these sales were communicated;
> b) indicate the documents available to demonstrate that these sale[s] are in fact samples and prototypes;
> c) explain whether the customer in question purchased these particular items before the date of the claimed sample sale and, if so, indicate how many were purchased;
> d) contrast the prices *and* quantities involved in these purchases with normal sales of these items, if any, to other customers *and* subsequent sales to the same customer;
> e) indicate the ultimate disposition of this merchandise, explain whether title was passed to the recipient of the merchandise, and indicate whether the merchandise was tested and destroyed during the trial application;
> f) describe any non-monetary payment and/or consideration made by your customer for the transactions.

(*Id.* (emphasis in original).) Bergerac responded by providing information regarding both priced and zero-value transactions including information concerning free samples and priced samples. Bergerac filed its response the same date as the statutory deadline for submissions of unsolicited factual information, January 20, 1998. *See* 19 C.F.R. § 351.301(b)(2) (1998).[1]

In its April 17, 1998, decision memo, Commerce stated it did not consider plaintiff's priced sample sales to be outside the ordinary course of trade and, therefore, such sales were not excluded by Commerce in its margin calculation. Specifically, Commerce stated, "[Bergerac] did not provide adequate evidence that any of these sales were unique or unusual and, therefore, outside the ordinary course of trade." (Analysis Methodology Used to Determine Dumping Margins for Bergerac, N.C., App., Pub. Doc. 31, at 5.)

In its case brief filed June 10, 1998, and at a public hearing held on June 18, 1998, Bergerac attempted to provide additional information concerning its priced samples. Commerce rejected such information, finding that it was untimely because Commerce had not specifically solicited the additional information after January 20, 1998.

On September 14, 1998, Commerce issued its final results stating it disagreed with Bergerac that it should exclude certain home market sales because they were outside the ordinary course of trade. Specifically, regarding priced samples, Commerce stated, "[W]hile it is clear that the invoices for these sales indicated that they were sample sales, such indication is not sufficient to demonstrate that the sale is unique or unusual or otherwise outside the ordinary course of trade." *Final Results*, 63 Fed. Reg. at 49,087. Commerce further stated, "Bergerac's argument that these sales were at a high price to cover the high cost of shipping

[1] The applicable regulations are those found at 19 C.F.R. Part 351, as Commerce stated, in its papers before the Court, that a request for investigation was filed with Commerce after the effective date of the new regulations as identified in 19 C.F.R. § 351.701 (1998). (Defendant's Memorandum in Opposition to Plaintiff's Motion for Judgment on the Agency Record Pursuant to CIT Rule 56.2, at 2 n.1.)

small packages does not address the Department's 'unique or unusual' standard concerning ordinary course of trade." *Id.* Accordingly, Commerce found Bergerac had not met its burden of proof in demonstrating that the sales in question were outside the ordinary course of trade. *See id.* at 49,087–88. Bergerac timely filed a summons in this action on October 13, 1998.

CONTENTIONS OF THE PARTIES

A. *Plaintiff*

Plaintiff argues it met its burden of demonstrating that the sales in question were sales of sample merchandise outside the ordinary course of trade. Plaintiff points to the commercial definition of the term "sample" that is defined as a "small quantity" that is "presented for inspection or examination." BLACK'S LAW DICTIONARY 1203 (5th ed. 1979). Plaintiff asserts it provided probative evidence that its priced sample sales were contemporaneously identified as priced samples in normal business records, generally smaller in quantity and higher in price than normal commercial sales, and generally tested and destroyed. Taking the evidence as a whole, Bergerac argues it satisfied its burden of proof that the sales in question were priced sample sales not in the ordinary course of trade.

Plaintiff argues Commerce's reference to certain agency decisions is inapposite because in the cases cited the challenging parties only provided evidence regarding higher prices or higher profits or smaller quantities in support of their claims that certain sales were outside the ordinary course of trade. *See, e.g., Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, From Germany*, 61 Fed. Reg. 38,166 (July 23, 1996); *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, et al.*, 62 Fed. Reg. 54,043, at 54,065–66 (Oct. 17, 1997) (final results of antidumping duty administrative reviews). Here, however, plaintiff contends the sample sales should have been considered outside the ordinary course of trade because their character as samples for testing purposes in non-commercial quantities placed them outside the ordinary course of trade.

Further, plaintiff argues, Commerce's reference to these cases in the *Final Results* demonstrates Commerce failed to consider the totality of the evidence before it and, in particular, overlooked key evidence provided by Bergerac—namely, that the samples were for testing purposes. In the past, Commerce has excluded home market sales of test samples on the grounds that they were outside the ordinary course of trade. *See, e.g., Granular Polytetrafluoroethylene Resin From Japan*, 58 Fed. Reg. 50,343, at 50,345 (Sept. 27, 1993) (final).

Bergerac further contends, in as much as it satisfied its burden of proof, Commerce failed to meet its burden of rebutting the evidence. Bergerac states that Commerce did not point to any inconsistencies or contradictions in the information provided but rather stated that "'Bergerac did not respond as to whether the customer had purchased these

particular items previously.'" (Brief in Support of Plaintiff's Motion for Judgment on the Agency Record Pursuant to CIT Rule 56.2, at 18 (Plaintiff's Br.) (quoting *Final Results*, 63 Fed. Reg. at 49,088).) Bergerac argues, however, it did provide such information. According to Bergerac, it stated in its case brief that "[s]amples are sold to customers." (Bergerac's Case Brief, App., Pub. Doc. 47, at 2 n.1.) Moreover, Bergerac contends, whether the samples were sold to existing customers is irrelevant to whether the sample sales are outside the ordinary course of trade.

Bergerac additionally argues that although Commerce found Bergerac failed to demonstrate the priced sample sales were "unique or unusual," there is no body of case law nor any regulation which defines "unique or unusual" as a separate standard or identifies factors relevant to such a standard.

Bergerac also criticizes Hercules's and defendant's arguments as inadequate. Bergerac argues Hercules's suggestion that Commerce was warranted in presuming the answers to Commerce's questions would not have supported Bergerac's claimed exclusion is unwarranted because Commerce did not apply a "facts available" test in this case. Bergerac also argues defendant's post hoc rationalization that since sample sales are a "'common occurrence,'" they are by definition "'a condition or practice that [is] normal for this particular trade,'" should not be considered by this Court as it is not the rationale stated by the agency in its administrative determination. (Reply Brief in Support of Plaintiff's Motion for Judgment on the Agency Record Pursuant to CIT Rule 56.2, at 8 (quoting Defendant's Memorandum in Opposition to Plaintiff's Motion for Judgment on the Agency Record Pursuant to CIT Rule 56.2, at 28 (Def.'s Br.)).) Further, Bergerac contends the defendant's assertion that Bergerac should be estopped from arguing its priced samples were not sold in commercial quantities is false. Rather, Bergerac argues, the small quantities involved in the priced sample sales were an essential part of its argument in favor of the exclusion of such sales.

Bergerac also contends Commerce improperly denied Bergerac the opportunity to provide additional information concerning the priced sample sales. According to Bergerac, Commerce did not identify alleged deficiencies in Bergerac's questionnaire responses concerning the priced sample sales until after the preliminary determination, and when Bergerac attempted to provide additional information, Commerce refused it as untimely. Bergerac contends, however, if Commerce believed Bergerac's questionnaire responses were deficient, Commerce was required by law to provide Bergerac an opportunity to remedy the alleged deficiency. As Commerce failed to provide such an opportunity, plaintiff asserts, the Court should remand this case to Commerce with instructions to exclude the sample sales.

B. *Defendant*

Defendant, United States, argues that Commerce's determination that Bergerac's priced sample sales were within the ordinary course of

trade is supported by substantial evidence and is otherwise in accordance with law. Initially, defendant argues, in as much as Congress has not identified every instance in which sales are to be considered outside the ordinary course of trade, *see* 19 U.S.C. § 1677(15) (1994), Commerce has broad discretion to establish its own methodology for determining whether sales are outside the ordinary course of trade. Commerce's regulation, 19 C.F.R. § 351.102(b) (1998), articulates Commerce's methodology. Under this methodology, there is a presumption that all sales are within the ordinary course of trade, and the party making the claim otherwise bears the burden of proving the sales are outside the ordinary course of trade.

According to defendant, Bergerac failed to meet its burden of proof that its priced sample sales were outside the ordinary course of trade. First, defendant argues, Bergerac merely identified the sales in question as "samples" and stated they were sold at a high price. Citing *Koyo Seiko Co., Ltd. v. United States*, 20 CIT 772, 783, 932 F. Supp. 1488, 1498 (1996), defendant argues the mere identification of sales as "samples" is insufficient to demonstrate that the sales in question are outside the ordinary course of trade. Second, defendant argues the mere existence of relatively high sales prices and smaller quantities is insufficient to demonstrate that the sales are outside the ordinary course of trade. Third, defendant claims the statement that the priced sample sales generally were tested and destroyed does not establish the sales in question were tested and destroyed. Fourth, citing *NTN Bearing Corp. of Am. v. United States*, 19 CIT 1165, 1172, 903 F. Supp. 62, 69 (1995), defendant contends the fact that Bergerac filed certifications as to the factual accuracy of its statements does not establish that the sales in question were outside the ordinary course of trade. Finally, defendant contends, Bergerac did not specifically answer Commerce's question whether Bergerac's customers had previously purchased these types of sample sales. According to defendant, these findings show plaintiff failed to meet its burden of proof and provide ample support for the agency's conclusion that the priced sample sales are within the ordinary course of trade.

To the extent plaintiff argues its priced samples should not be used for purposes of calculating normal value because they were not made in "commercial quantities," defendant contends the argument should not be considered by this Court. According to defendant, Bergerac never argued to Commerce that its priced samples were not made in the usual commercial quantities, and to the extent that it does so now, the Court should not address the argument based on Bergerac's failure to exhaust its administrative remedies. *See* 28 U.S.C. § 2637(d) (1994).

Defendant adds Bergerac now concedes that it is a "'common occurrence'" for samples to be sold to existing customers. (Def.'s Br. at 23 (quoting Plaintiff's Br. at 19).) Defendant argues this concession validates Commerce's decision as such a fact makes the sample sales at issue within the normal course of trade under consideration. Defendant also argues Bergerac's reference to the definition of "sample" in BLACK'S LAW

DICTIONARY fails to support Bergerac's argument. Specifically, defendant contends while a dictionary definition may be helpful in defining a statutory term, it is not helpful where, as here, the statute contains only illustrative uses of the term, and the merchandise at issue is not on that list.

Defendant also argues Commerce acted within its discretion by not affording Bergerac the opportunity to submit additional factual information after the January 20, 1998, deadline. According to defendant, agency regulations, which have been upheld as reasonable by the courts, state that unsolicited factual information submitted later than 140 days after the last day of the anniversary month is considered untimely. *See* 19 C.F.R. § 351.301. As Bergerac submitted new factual information in its case brief and at the administrative hearing in June 1998, well after the January 20, 1998, deadline, Commerce properly rejected the information.

C. *Defendant-Intervenor*

Defendant-Intervenor, Hercules, argues sample sales are considered to be within the ordinary course of trade unless the party asserting that the sales are outside the ordinary course of trade proves otherwise. Here, according to defendant-intervenor, plaintiff failed to meet its burden of proof as it did not answer Commerce's specific request for information concerning a comparison of prices, quantities, and customers for the products concerned in its questionnaire responses. Moreover, defendant-intervenor contends, plaintiff's argument that its one-kilogram sale was "almost six times higher than the normal market price" is, without more, insufficient to prove the sale was outside the ordinary course of trade. Defendant-intervenor additionally asserts plaintiff's identifying sales as samples is equally insufficient, without more, to prove the sales were outside the ordinary course of trade. Further, defendant-intervenor argues certifying to the factual accuracy of a submission does not prove a sale is a sample sale outside the ordinary course of trade. In light of the lack of information provided, defendant-intervenor contends Commerce correctly considered the priced sample sales to be in the ordinary course of trade and included them in the margin calculation. Defendant-intervenor additionally contends Commerce properly excluded information provided by plaintiff in its case brief and at the hearing in June 1998 as untimely as it was submitted after the statutory deadline. Thus, defendant-intervenor argues, plaintiff's motion should be denied and Commerce's determination affirmed.

STANDARD OF REVIEW

This Court will sustain a final determination by Commerce unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (1994). Substantial evidence is that which "a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951), *quoted in Matsushita Elec. Indus. Co., Ltd. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984). For the purposes of judicial review, the

evidence is limited to the administrative record. *See Toyota Motor Sales, U.S.A., Inc. v. United States*, 15 F. Supp. 2d 872, 877 (CIT 1998). Whether Commerce properly excluded plaintiff's information submitted after January 20, 1998, depends on "whether Commerce complied with the statute defining the administrative record for review." *Kerr-McGee Chem. Corp. v. United States*, 21 CIT 11, 18, 955 F. Supp. 1466, 1471 (1997).

In determining the lawfulness of an agency's construction of a statute, we are guided by the Supreme Court's decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under *Chevron*, the first question is "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842–43.

If, however, the statute is "silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843 (footnote omitted). Thus, the second element of *Chevron* directs the Court to consider the reasonableness of an agency's determination. To survive judicial scrutiny, "an agency's construction need not be the *only* reasonable interpretation or even the *most* reasonable interpretation. Rather, a court must defer to an agency's reasonable interpretation of a statute even if the court might have preferred another." *Koyo Seiko Co., Ltd. v. United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994) (citation omitted) (emphasis in original).

DISCUSSION

A. *Supplemental Information*

Plaintiff argues Commerce should have accepted supplemental information concerning priced sample sales submitted after the statutory deadline for new information as Commerce did not identify alleged deficiencies in plaintiff's questionnaire responses until after the preliminary determination. Plaintiff's argument lacks merit. Factual information for Commerce's consideration for the final results of an administrative review "is due no later than * * * 140 days after the last day of the anniversary month * * *." 19 C.F.R. § 351.301(b)(2). Previously, this Court has sustained Commerce's rejection of new factual information submitted untimely pursuant to its regulations. *See, e.g., Mukand, Ltd. v. United States*, Court No. 98–04–00925, 1999 Ct. Int'l Trade LEXIS 34, *12–15 (CIT April 9, 1999); *NSK Ltd. v. United States*, 16 CIT 745, 749, 798 F. Supp. 721, 725 (1992). As the supplemental information was offered to Commerce in June 1998, after the January 20, 1998[2], deadline

[2] The anniversary month for this administrative review was in August 1997. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 62 Fed. Reg. 50,292 (Sept. 25, 1997). January 18, 1998, was the 140th day from the last day in the anniversary month, August 31, 1997. As January 18 fell on a Sunday and as the following day was a national holiday, the deadline for submitting new factual information for the final results of the administrative review at issue was on January 20, 1998.

for new factual information, this Court finds Commerce's rejection of the supplemental information as untimely was reasonable.

To the extent plaintiff argues Commerce had a separate obligation to provide plaintiff an opportunity to remedy the alleged deficiencies, plaintiff's argument must also fail. Section 1677m(d), defining an agency's obligation for providing respondents an opportunity to remedy alleged deficiencies in information submitted to it, states, in pertinent part[3]:

> (d) Deficient submissions
>
> If the administering authority * * * determines that a response to a request for information under this subtitle does not comply with the request, the administering authority * * * shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of investigations or reviews under this subtitle.

19 U.S.C. § 1677m(d) (1994). In the case at bar, Commerce provided plaintiff an opportunity to clarify its contention that the sample sales should be excluded from the margin calculation in the supplemental questionnaire issued in December 1997. Thus, to the extent Commerce was statutorily obligated to provide plaintiff an opportunity to remedy or explain the alleged deficiencies, Commerce fulfilled its obligation. Therefore, the Court finds Commerce properly rejected the June 1998 submissions as untimely.[4]

B. *Ordinary Course of Trade*

The antidumping duty laws of the United States allow Commerce to issue antidumping duty orders upon imported merchandise which is being, or is likely to be, sold in the United States at less than fair value. *See* 19 U.S.C. § 1673 (1994). In determining whether subject merchandise is being, or is likely to be, sold at less than fair value in an antidumping duty determination, a comparison is made between the price of the merchandise in the United States ("export price" or "constructed export

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[3] Although plaintiff does not identify the statute under which Commerce would be required to provide plaintiff an opportunity to remedy or explain deficiencies in its submissions, it appears plaintiff is referring to 19 U.S.C. § 1677m(d) (1994).

[4] Plaintiff cites *Olympic Adhesives, Inc. v. United States*, 899 F.2d 1565 (Fed. Cir. 1990), and *Ta Chen Stainless Steel Pipe, Ltd. v. United States*, Court No. 97-08-01344, 1999 Ct. Int'l Trade LEXIS 110 (CIT Oct. 28, 1999), to support its argument. These cases, however, are distinguishable from the case at bar as they concern an agency's ability to use adverse facts. Additionally, although the *Ta Chen* court found an agency's use of a general questionnaire was insufficient to satisfy the agency's "statutory obligation to provide respondents with a chance to remedy deficient submissions," *Ta Chen*, 1999 Ct. Int'l Trade LEXIS 110, *41, its conclusion was based on the fact that the agency never specifically requested the information against which it applied adverse facts. As stated above, Commerce in the case at bar specifically requested information concerning plaintiff's sample sales in the supplemental questionnaire issued in December 1997. Although Commerce's framing of the question is less than a model of clarity, *e.g.*, asking for information concerning "zero-value transactions (samples and prototypes)," Commerce's specific questions indicated it was interested in a broader description of sample sales than those without consideration, *e.g.*, Commerce asked plaintiff to describe any "consideration made by your customer for the transactions." (Bergerac's Supplemental Questionnaire, Plaintiff's Appendix Pursuant to CIT Rule 56.2 (App.), Public Document (Pub. Doc.) 20, at 17.) Also, as plaintiff submitted information regarding zero-value and priced sample sales, the Court finds plaintiff sufficiently had an opportunity to explain the alleged deficiencies regarding the sample sales in question. Plaintiff's reference to these cases is unpersuasive.

price") and its price in a foreign market ("normal value").[5] *See Huffy Corp. v. United States*, 10 CIT 214, 215, 632 F. Supp. 50, 52 (1986). The "normal value" is the price at which the foreign like product is first "sold" for consumption in the exporting country "in the usual commercial quantities and in the ordinary course of trade." 19 U.S.C. § 1677b(a)(1)(B)(i) (West Supp. 1999).[6] Thus, the price of the merchandise is included in the margin calculation if, among other things, the merchandise is "sold" in the "ordinary course of trade." If it is not "sold" or not sold in the "ordinary course of trade," the merchandise is excluded from the margin calculation.

The Court of Appeals for the Federal Circuit has held that the term "sold" requires (1) a transfer of ownership to an unrelated party; and (2) consideration. *See NSK Ltd. v. United States*, 115 F.3d 965, 975 (Fed. Cir. 1997). The parties do not dispute that there was consideration for priced sample sales at issue here, and there was a transfer of ownership to unrelated parties. Therefore, the priced sample sales at issue are considered "sold" for the purposes of the "normal value" calculation under section 1677b(a)(1)(B)(i).

The phrase "ordinary course of trade" is defined by statute as "the conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to merchandise of the same class or kind." 19 U.S.C. § 1677(15).[7] What is to be considered "outside the ordinary course of trade" includes, "*among others*, * * * (A) Sales disregarded under section 1677b(b)(1) [below cost sales] of this title; (B) Transactions disregarded under section 1677b(f)(2) [transactions between affiliated parties] of this title." 19 U.S.C. § 1677(15) (emphasis added).

Determining whether a sale or transaction is outside the ordinary course of trade is a question of fact. In making this determination, Commerce considers not just "one factor taken in isolation but rather * * * all the circumstances particular to the sales in question." *Murata Mfg. Co., Ltd. v. United States*, 17 CIT 259, 264, 820 F. Supp. 603, 607 (1993)

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[5] In 1994, the Uruguay Round Agreements Act (URAA) substituted the term "export price" for the term "U.S. price" and the term "normal value" for the term "foreign market value." *See* URAA, PUB. L. NO. 103-465, §§ 233(a)(1), (2)(A), 108 Stat. 4809, 4878 (Dec. 8, 1994).

[6] The relevant section of the statute pertaining to the calculation of "normal value" states:

> (a) Determination
> In determining under this subtitle whether subject merchandise is being, or is likely to be, sold at less than fair value, a fair comparison shall be made between the export price or constructed export price and normal value. In order to achieve a fair comparison with the export price or constructed export price, normal value shall be determined as follows:
>
> (1) Determination of normal value
>
> (A) In general
> The normal value of the subject merchandise shall be the price described in subparagraph (B) * * *
>
> (B) Price
> The price referred to in subparagraph (A) is—
>
> (i) the price at which the foreign like product is first sold (or, in the absence of a sale, offered for sale) for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level of trade as the export price or constructed export price * * *.

19 U.S.C. § 1677b(a)(1)(B)(i) (West Supp. 1999).

[7] Commerce's regulations define "ordinary course of trade" as having "the same meaning as in section 771(15) of the Act [19 U.S.C. § 1677(15)]." 19 C.F.R. § 351.102(b) (1998).

(citation omitted). Commerce's methodology for making this determination is codified in section 351.102(b) of Commerce's regulations. *See* 19 C.F.R. § 351.102(b)[8]; *see also Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, et al.*, 64 Fed. Reg. 35,590, at 35,620 (July 1, 1999) (final results of antidumping duty administrative review).

Bergerac criticizes Commerce's methodology for determining whether certain sales or transactions are outside the ordinary course of trade as being void of any meaningful standards and failing to identify information that is necessary for Commerce to make its determination. Consequently, Bergerac argues, it is inappropriate for Commerce to claim Bergerac has not met its burden of proof that the sales in question were outside the ordinary course of trade. Bergerac's argument lacks merit. Plaintiff's criticism appears essentially to involve a question of statutory interpretation as Commerce's methodology, codified at 19 C.F.R. § 351.102(b), effectively interprets the statutory phrase "outside the ordinary course of trade." 19 U.S.C. § 1677(15). In resolving questions of statutory interpretation, *Chevron* requires this Court first to determine whether the statute is clear on its face.[9] If the language of the statute is clear, then this Court must defer to Congressional intent. *See Chevron*, 467 U.S. at 842–43. If the statute is unclear, however, then the question for the Court is whether the agency's answer is based on a permissible construction of the statute. *See id.* at 843; *see also Corning Glass Works v. United States*, 799 F.2d 1559, 1565 (Fed. Cir. 1986) (finding the agency's definitions must be "*reasonable* in light of the language, policies and legislative history of the statute").

Here, the statutory provision defining what is considered outside the ordinary course of trade is unclear. While the statute specifically defines "ordinary course of trade," it provides little assistance in determining what is outside the scope of that definition. The statute merely identifies a non-exhaustive list of situations in which sales or transactions are to be considered outside the "ordinary course of trade." This Court finds

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[8] Section 351.102(b) of the regulation states, in part, "The Secretary may consider sales or transactions to be outside the ordinary course of trade if the Secretary determines, based on an evaluation of all of the circumstances particular to the sales in question, that such sales or transactions have characteristics that are extraordinary for the market in question." 19 C.F.R. § 351.102(b). Examples that might be considered outside the ordinary course of trade include: (1) off-quality merchandise; (2) merchandise produced according to unusual product specifications; (3) merchandise sold at aberrational prices or with abnormally high profits; (4) merchandise sold pursuant to unusual terms of sale; or (5) merchandise sold to an affiliated party not at an arm's length transaction. *See* 19 C.F.R. § 351.102(b). The Statement of Administrative Action accompanying the URAA contains similar language and identifies similar types of transactions Commerce may consider to be outside the ordinary course of trade, including (1) sales disregarded as being below-cost; and (2) transactions between affiliated persons. *See* H.R. Doc. No. 103-316, vol. 1, at 834 (1994), reprinted in 1994 U.S.C.C.A.N. 3773, 4171.

[9] The Court notes the recent Supreme Court decision in *Christensen v. Harris Co.*, 120 S. Ct. 1655 (2000), does not apply. In *Christensen*, the Supreme Court held that *Chevron* deference does not apply to an "opinion letter" issued by the Acting Administrator of the United States Department of Labor's Wage and Hour Division (Labor) because Labor's interpretation of the statute at issue was "not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking." *Id.* at 1662 (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)). Unlike *Christensen*, this case examines an agency's regulation construing an ambiguous statute. In accordance with the Administrative Procedures Act, 5 U.S.C. § 553 (1994), the regulation underwent a notice-and-comment process. *See* 5 U.S.C. § 553(b) & (c); *see also Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296 (May 19, 1997) (revising regulations on antidumping and countervailing duty proceedings). Consequently, *Chevron* deference applies.

the statute is ambiguous as to what constitutes a sale outside the ordinary course of trade.

What Congress intended to exclude from the "ordinary course of trade" is also not immediately clear from the statute's legislative history, amended by the Uruguay Round Agreements Act (URAA) in 1994. In the Statement of Administrative Action accompanying the URAA, Congress stated that in addition to the specific types of transactions to be considered outside the ordinary course of trade, "Commerce may consider other types of sales or transactions to be outside the ordinary course of trade when such sales or transactions have characteristics that are not ordinary as compared to sales or transactions generally made in the same market." H.R. Doc. No. 103–826, vol. 1, at 834 (1994), reprinted in 1994 U.S.C.C.A.N. 3773, 4171. Congress also stated that as the statute does not provide an exhaustive list of situations which qualify as being outside the ordinary course of trade, "the Administration intends that Commerce will interpret section 771(15) [19 U.S.C. § 1677(15)] in a manner which will avoid basing normal value on sales which are extraordinary for the market in question." *Id.* This Court finds the legislative history is also ambiguous as to what constitutes a sale outside the ordinary course of trade.

Because neither the statutory language nor the legislative history explicitly establishes what is considered to be outside the "ordinary course of trade," the Court assesses the agency's interpretation of the provision as codified by the regulation to determine whether the agency's interpretation is reasonable and in accordance with the legislative purpose. *See Chevron*, 467 U.S. at 843. In determining whether Commerce's interpretation is reasonable, the Court considers, among other factors, the express terms of the provisions at issue, the objectives of those provisions, and the objective of the antidumping scheme as a whole. *See, e.g., Mitsubishi Heavy Indus., Ltd. v. United States*, 15 F. Supp. 2d 807, 813 (CIT 1998). This Court has stated that the purpose of the ordinary course of trade provision is "to prevent dumping margins from being based on sales which are not representative" of the home market. *See Monsanto Co. v. United States*, 12 CIT 937, 940, 698 F. Supp. 275, 278 (1988).

As stated above, the agency's methodology for deciding when sales are outside the "ordinary course of trade" has been to examine the totality of the circumstances surrounding the sale or transaction in question to determine whether the sale or transaction is extraordinary. Commerce's regulation specifically states, "sales or transactions [may be considered] outside the ordinary course of trade if * * *, based on an evaluation of all of the circumstances particular to the sales in question, [] such sales or transactions have characteristics that are extraordinary for the market in question." 19 C.F.R. § 351.102(b). Commerce's methodology allows it, on a case-by-case basis, to examine all conditions and practices which may be considered ordinary in the trade under consideration and to determine which sales or transactions are, therefore, out-

side the "ordinary course of trade." While such a methodology gives Commerce wide discretion in deciding under what circumstances sales or transactions are outside the ordinary course of trade, circumstances which will, by necessity, differ in each case, this Court finds, in light of the statute's legislative purpose, Commerce's interpretation of the statute reasonable.[10]

Bergerac, in its papers before the Court, principally objects to Commerce's inclusion of certain priced sample sales in the margin calculation that Bergerac claims were made outside the ordinary course of trade.[11] To justify its claimed exclusion, Bergerac argues it provided probative evidence that its priced sample sales were sample sales outside the ordinary course of trade. Specifically, Bergerac asserts it provided evidence that the priced sample sales were contemporaneously identified as priced samples in the normal business record, sold in small quantities, sold at high prices, generally tested and destroyed, and Bergerac provided certifications of factual accuracy regarding this information. Bergerac also contends that Commerce, in the *Final Results*, overlooked key elements of the evidence provided by Bergerac, such as the fact that the samples were provided for testing purposes, as Commerce neither mentioned nor specifically cited cases dealing with samples which have been tested and destroyed. Bergerac maintains that the inclusion of these priced sample sales in calculating foreign market value erroneously increased its total potential dumping duties. Bergerac seeks their exclusion and recalculation of its dumping margins.

In the *Final Results*, Commerce explained its reasons for including the sales in question as home market sales in the ordinary course of trade:

> Regarding priced samples, while it is clear that the invoices for these sales indicated that they were sample sales, such indication is not sufficient to demonstrate that the sale is unique or unusual or otherwise outside the ordinary course of trade. *See* Antifriction Bearings (Other Than Tapered Roller Bearings[)] and Parts There-

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[10] Bergerac also argues Commerce failed to articulate adequately a standard for determining whether a sale or transaction is "unique or unusual" as applied in the case at bar. Bergerac's argument lacks merit. While Commerce used the words "unique or unusual" in its "ordinary course of trade" analysis at issue here, *see Industrial Nitrocellulose From France*, 63 Fed. Reg. 49,085, at 49,087 (Sept. 14, 1998) (final results of antidumping administrative review), the Court finds, upon review of the determinations in which Commerce has used "unique" or "unusual," the words do not constitute a separate methodology but rather represent circumstances Commerce considers in applying its totality of the circumstances methodology to determine whether the sales or transactions in question are outside the ordinary course of trade. *See, e.g., Polyvinyl Alcohol From Taiwan*, 61 Fed. Reg. 14,064, at 14,068 (March 29, 1996) (final determination of sales at less than fair value) (finding no evidence existed that the sales in question were "unusual or extraordinary" for the market and therefore the sales were not outside the ordinary course of trade); *Gray Portland Cement and Clinker From Mexico*, 62 Fed. Reg. 17,148, at 17,154 (April 9, 1997) (final results of antidumping duty administrative review) (stating failure to exclude certain sales from the normal value calculation would violate the intent of the Statement of Administrative Action because normal value would be based on sales which were "unusual and unrepresentative"). The Court notes the term "unusual" is oft repeated as a qualifying adjective describing examples of sales that the Secretary might consider as being outside the ordinary course of trade under Commerce's definition of "ordinary course of trade" in its regulations. *See* 19 C.F.R. § 351.102(b) ("Examples of sales that the Secretary might consider as being outside the ordinary course of trade are sales or transactions involving * * * unusual product specifications * * * [or] * * * unusual terms of sale * * *."). Moreover, the Court finds the words "unique" and "unusual" are synonymous with the term "extraordinary," *see* WEST'S LEGAL THESAURUS/DICTIONARY 773, 779 (1985) (listing "extraordinary" as a synonym for both "unique" and "unusual"), expressed as part of the totality of the circumstances methodology now codified in Commerce's regulation, 19 C.F.R. § 351.102(b), herein found to be a reasonable interpretation of the statute. Thus, Begerac's argument fails as a matter of law.

[11] The sales contested on appeal are limited to priced sample sales.

> of from France, Germany, Italy, Japan, Singapore, and the United Kingdom, Final Results of Antidumping Duty Administrative Reviews, 62 FR 2081 (January 15, 1997) (where, although we verified that certain sales were designated as samples in a respondent's records, we determined this was insufficient to find them outside the ordinary course of trade since such evidence "merely proves that respondent identified sales recorded as samples in its own records"). Such evidence does not indicate that the sales were made outside the ordinary course of trade for purposes of calculating normal value in this review. Bergerac's argument that these sales were at a high price to cover the high cost of shipping small packages does not address the Department's "unique or unusual" standard concerning ordinary course of trade. *See* Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled From Germany (61 FR 38166, July 23, 1996) as discussed in Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from France, et. al.; Final Results of Antidumping Duty Administrative Reviews (62 FR 54043, at 54065–54066, October 17, 1997).
>
> * * * * * * *
>
> Regarding both priced samples and trial transactions, Bergerac failed to provide certain information which we requested in a supplemental questionnaire specifically in order to determine whether these transactions were outside the ordinary course of trade. For example, regarding both types of sales at issue, Bergerac did not respond as to whether the customer had purchased these particular items previously. For these reasons, the record is incomplete as to whether sales of these products were made to these customers prior to the dates of the claimed sample and trial transactions and we have retained them for use in our calculation of normal value.

Final Results, 63 Fed. Reg. at 49,087–88.

This Court has stated that Commerce cannot exclude sales allegedly outside the ordinary course of trade from a "normal value" calculation unless there is a complete explanation of the facts which establish the extraordinary circumstances in which the particular sales are outside the ordinary course of trade. *See, e.g., NTN Bearing Corp. of Am. v. United States*, 19 CIT 1221, 1229, 905 F. Supp. 1083, 1091 (1995). As stated previously, in determining whether certain home market sales are outside the ordinary course of trade, Commerce considers not just one factor in isolation but all the circumstances particular to the sales in question. *See CEMEX, S.A. v. United States*, 19 CIT 587, 589 (1995) (citing *Murata*, 820 F. Supp. at 607 (quoting *Certain Welded Carbon Steel Standard Pipes and Tubes from India*, 56 Fed. Reg. 64,753, at 64,755 (1991))); *see also* 19 C.F.R. § 351.102(b). Moreover, an analysis of these factors should be guided by the purpose of the ordinary course of trade provision which is to prevent dumping margins from being based on sales which are not representative of the home market. *Monsanto*, 698 F. Supp. at 278. Factors Commerce has considered in the past, which this Court has upheld, include, among others, h me market demand, vol-

ume of home market sales, duration of production, profit margin, and purpose. *See, e.g., CEMEX*, 19 CIT at 589–93. In sum, "ordinary course of trade is determined on a case-by-case basis by examining all of the relevant facts and circumstances." *Id.* at 593. The task, then, is to discern whether Commerce's determination was supported by substantial evidence.

The plaintiff bears the burden of demonstrating the sales in question that Commerce included in its calculations were outside the ordinary course of trade. *See, e.g., Koyo Seiko*, 932 F. Supp. at 1497; *see also NTN Bearing*, 903 F. Supp. at 68–69.

This Court is persuaded that substantial evidence supports Commerce's determination that Bergerac failed to meet its burden of proof that the alleged sample sales were outside the ordinary course of trade. In *NTN Bearing Corp. of Am. v. United States*, 20 CIT 508, 924 F. Supp. 200 (1996), the Court upheld Commerce's ruling that sample sales identified as sample or prototype sales alone does not support the sales classification as outside the ordinary course of trade for the purposes of antidumping calculations. *See id.* at 207. Similarly here, evidence that the sales were marked as sample sales is insufficient to support Bergerac's claim. The Court has also affirmed Commerce's refusal to exclude "infrequent sales of small quantities of certain models or sales of models at a high price to only a few customers" from the ordinary course of trade. *See id.* (quoting *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, et al.*, 58 Fed. Reg. 64,720, at 64,732 (final results antidumping duty administrative review)). Thus, sales, like those at issue here, sold in small quantities[12] and at high prices are insufficient to establish that they are outside the ordinary course of trade.

Additionally, Bergerac's argument that Commerce erred because it overlooked and failed to articulate in the *Final Results* key elements of the evidence provided by Bergerac, such as the fact that the samples were generally tested and destroyed, is without merit. Although an administrative agency must generally explain the reasons for its decision in order for the reviewing court to ascertain the path of reasoning which led to the final outcome, *see Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285–86 (1974); *see also Asociacion Colombiana de Exportadores v. United States*, 12 CIT 1174, 1177, 704 F. Supp. 1068, 1071 (1988), a court may "'uphold [an agency's] decision of less than ideal clarity if the agency's path may reasonably be discerned.'" *Ceramica Regiomontana, S.A. v. United States*, 810 F.2d 1137, 1139 (Fed. Cir. 1987) (quoting *Bowman Transp.*, 419 U.S. at 286).

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[12] Defendant contends Bergerac failed to argue to Commerce that its priced sample sales were not made in the usual commercial quantity, and therefore, to the extent it does so now, the argument should not be considered by this Court. Plaintiff rebuts that the Court should consider this argument as small quantities involved in the priced samples were an essential part of its argument before Commerce. Although it is unclear to the Court whether Bergerac made the specific argument that the sample sales in question were not of the "usual commercial quantity," Bergerac stated in its response to Commerce's supplemental questionnaire that "[s]amples that are sold are purchased at prices that cover the high cost of handling small shipments." (Bergerac Supplemental Questionnaire, App., Pub. Doc. 20, at 18.) To the extent plaintiff's argument suggests the sales in question were shipped in small quantities, the Court will consider Bergerac's argument as being properly before it.

In this case, while Commerce's reasoning may not be a model of clarity, its decision is obvious in light of the determination as a whole. Bergerac does not identify, nor can the Court find, any evidence supporting Bergerac's contention that the sample sales in question actually were tested and destroyed. Bergerac merely states that the samples of industrial nitrocellulose are outside the ordinary course of trade because they "generally" are "tested and destroyed." (Bergerac Supplemental Questionnaire, App., Pub. Doc. 20, at 18.) Bergerac does not demonstrate that the sample sales in question in fact were tested and destroyed. *See, e.g., Koyo Seiko*, 932 F. Supp. at 1498 (denying consideration of plaintiff's claim that samples were negotiated separately from normal sales where record did not demonstrate, more than through an announcement, that prices for plaintiff's samples were negotiated separately from normal sales). Without more, this factor is unpersuasive. Here, Commerce's path may be reasonably discerned; it included the sample sales because Bergerac failed to prove the samples were not sold in the ordinary course of trade. Consequently, a remand for further explanation is not necessary.

Additionally, Bergerac's argument that it filed certifications of factual accuracy with its submissions does not establish its sales were outside the ordinary course of trade. *See NTN Bearing*, 903 F. Supp. at 68–69 (stating a certification requirement does not displace substantive burdens of proof which remain with the party who has access to the information).

Finally, by not responding to Commerce's question whether Bergerac's customers had previously purchased the priced samples in question, Bergerac prevented Commerce from having sufficient facts necessary to make its determination. Commerce's decision to require additional evidence to demonstrate that the sales were outside the ordinary course of trade was consistent with the statutory scheme and was a reasonable construction of the provision at issue. *See Koenig & Bauer-Albert AG v. United States*, 15 F. Supp. 2d. 834, 850 (CIT 1998).

As Bergerac inadequately substantiated its claim, Commerce properly declined to exclude from the "normal value" calculation certain sales identified by Bergerac as sample sales made outside the ordinary course of trade. The Court sustains Commerce's decision as supported by substantial evidence and in accordance with law.

CONCLUSION

For the reasons stated above, Bergerac's motion for Judgment Upon An Agency Record is denied in all respects, and the *Final Results* are affirmed. This case is hereby dismissed.

[PUBLIC VERSION]

(Slip Op. 00–72)

WORLD FINER FOODS, INC., ET AL., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND BORDEN, INC., NEW WORLD PASTA CO., AND GOOCH FOODS, INC., DEFENDANT-INTERVENORS

Consolidated Court No. 99–03–00138

[ITA determination remanded.]

(Dated June 26, 2000)

Akin, Gump, Strauss, Hauer & Feld, L.L.P. (Spencer S. Griffith, Patrick F. J. Macrory and *Thomas J. McCarthy)* for plaintiff World Finer Foods, Inc.

O'Melveny & Myers L.L.P. (Peggy A. Clarke and *Gary N. Horlick)* attorneys for plaintiff Barilla Alimentare, S.p.A.

Barnes, Richardson & Colburn (Michael J. Chessler and *Matthew T. McGrath)* for plaintiff La Molisana Industrie Alimentari, S.p.A.

David W. Ogden, Acting Assistant Attorney General, *David M. Cohen*, Director, Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Erin E. Powell), Patrick V. Gallagher, Jr.*, Senior Attorney, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

Collier, Shannon, Rill & Scott (Paul Rosenthal and *David Smith)* for defendant-intervenors Borden, Inc., New World Pasta, Co. and Gooch Foods, Inc.

OPINION

RESTANI, *Judge:* This matter is before the court on a Motion for Judgment Upon the Agency Record, pursuant to USCIT Rule 56.2, brought by plaintiffs World Finer Foods, Inc. ("Finer Foods"), Barilla Alimentare, S.p.A. ("Barilla") and La Molisana Industrie Alimentari, S.p.A. ("La Molisana").

Under review are the results of the U.S. Department of Commerce's ("Commerce") first administrative review of the antidumping duty order in *Certain Pasta from Italy*, 64 Fed. Reg. 6615 (Dep't Commerce 1999) (notice of final results and partial rescission of antidumping duty admin. rev.) [hereinafter "*Final Results*"]. It covers the period from January 19, 1996 through June 30, 1997. *Final Results*, 64 Fed. Reg. at 6,615.

Finer Foods contests Commerce's application of total adverse facts available under 19 U.S.C. § 1677e (1994). Both Finer Foods and Barilla challenge whether the total adverse facts available rate selected by Commerce is properly corroborated. Finally, La Molisana protests Commerce's refusal to accept corrected clerical information as ministerial correction.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (1994). In reviewing Commerce's determination in antidumping investigations, the court will hold unlawful those agency determinations which are un-

supported by substantial evidence on the record, or otherwise not in accordance with law. 19 U.S.C. § 1515a(b)(1)(B) (1994).

I. Application of Total Adverse Facts Available to Arrighi

BACKGROUND

Arrighi S.p.A. Industrie Alimentari ("Arrighi"), an Italian pasta manufacturer, was a supplier of Finer Foods at the time of the original antidumping investigation. *Letter from Finer Foods to Commerce* (Mar. 10, 1998), at 1, C.R. Doc. 38, Finer Foods' App., Tab 4, at 1. Arrighi received a partial facts available margin of 21.34% in the original antidumping investigation, which effectively precluded it from exporting to the United States. *Letter from Finer Foods to Commerce* (Oct. 20, 1997), at 7, P.R. Doc. 67, Finer Foods' App., Tab 3, at 7. Arrighi stopped exporting pasta to the United States in May, 1997.[1] *Commerce's Memorandum to File* (Aug. 8, 1997), at 1, P.R. Doc. 10, Finer Foods' App., Tab 1, at 1. Arrighi advised Commerce that it had ceased exporting to the United States and the brand name pasta it previously exported to the United States was now being produced and exported by another Italian company. *Id.*

Nevertheless, Commerce sent Arrighi a questionnaire and requested that Arrighi respond and cooperate with regard to the administrative review. *Letter from Commerce to Arrighi* (Sept. 4, 1997), at 1, P.R. Doc. 18, Finer Foods' App., Tab 2, at 1. Commerce stated that it would "attempt to accommodate any difficulties that [Arrighi] encounter[ed] in answering this questionnaire," and asked Arrighi to contact the official in charge if there were any questions. *Id.* at 2, Finer Foods' App., Tab 2, at 2.

Arrighi responded to Commerce and explained in further detail that its financial situation had deteriorated dramatically due to the antidumping duty rate that Commerce imposed in the original investigation and that Arrighi had to devote its limited resources to developing alternative markets outside of the United States. *Letter from Finer Foods to Commerce* (Oct. 20, 1997), at 6–9, Finer Foods' App., Tab 3, at 6–9. Arrighi could not spare the personnel required to answer Commerce's questionnaire even though Finer Foods had offered to pay all the legal and experts' fees for Arrighi to respond to the questionnaire. *Id.* at 8, Finer Foods' App., Tab 3, at 8. Arrighi did offer to "supply limited information if the Department felt that might be worthwhile or helpful" in its review. *Id.* at 9, Finer Foods' App., Tab 3, at 9. Commerce never responded to this letter.

Finer Foods submitted to Commerce all the information in its possession regarding purchases from Arrighi. *Letter from Finer Foods to Commerce* (Mar. 10, 1998), at 1–7, Finer Foods' App., Tab 4, at 1–7. Commerce also did not respond to this letter.

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[1] Finer Foods continued to import pasta from Arrighi while it wound down its purchases of Arrighi pasta after the high cash deposit rate was imposed. It is the duties due on the last entries from Arrighi that give rise to this action.

Commerce determined in the Final Results that Arrighi failed to cooperate by not responding to the antidumping questionnaire and did not act to the best of its ability to comply with Commerce's request for information. *Final Results*, 64 Fed. Reg. at 6616. Commerce assigned an adverse facts available margin of 71.49%, the highest margin from the petition. *Id.* Finer Foods challenges the use of adverse facts available against Arrighi.

DISCUSSION

Finer Foods objects to the use of adverse facts available where it has made every effort to cooperate; it has urged Arrighi to cooperate; Arrighi offered limited cooperation and Commerce never responded to these offers of cooperation. The court agrees.

Commerce correctly notes that it may resort to facts available if Arrighi failed "to provide [the requested] information by the deadlines for submission * * * or in the form and manner requested." 19 U.S.C. § 1677e(a)(2)(B). Before Commerce can resort to adverse facts available, however, Commerce is required to comply with 19 U.S.C. § 1677m. *Id.* Commerce did not properly comply with the requirements of subsections (c) and (e) of § 1677m.

In *Borden, Inc. v. United States*, this court made clear that the new statutory scheme, 19 U.S.C. § 1677m, is designed to prevent the unrestrained use of facts available as to a firm that makes its best efforts to cooperate with Commerce. 4 F. Supp.2d 1221, 1245 (Ct. Int'l Trade 1998), *aff'd sub nom. F. LLI De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, No. 99–1318, 2000 U.S. App. Lexis 14148 (Fed Cir. June 16, 2000). This section was enacted as a part of the Uruguay Rounds Agreement Act ("URAA"), Pub. L. 103–465, § 231, to implement portions of Annex II to the Antidumping Agreement, which provides, in part, that information which "may not be ideal" should not be disregarded if the party "has acted to the best of its ability." Annex II of the Agreement on Implementation of Article VI of GATT at ¶ 5, *reprinted in*, U.S. Trade Representative, *Final Texts of the GATT Uruguay Round Agreements* 168 (1994) [hereinafter "Annex II"].

The key provisions of 19 U.S.C. § 1677m for purposes of this case are subsection (c), regarding "difficulties in meeting requirements," and subsection (e) regarding the "use of certain information." Subsection (c) requires a party to promptly notify Commerce as to why it cannot comply with the requirements of the questionnaire. 19 U.S.C. § 1677m(c)(1) (1994).[2] Arrighi did that. Section 1677m(c)(1) also requires Arrighi to offer an alternative form in which it could submit the information. *Id.*

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[2] 19 U.S.C. § 1677m(c) provides in relevant part:

(c) Difficulties in meeting requirements

(1) Notification by interested party

If an interested party, promptly * * * notifies the administering authority * * * that such party is unable to submit the information requested in the requested form and manner, together with a full explanation and suggested alternative forms in which such party is able to submit the information, the administering authority * * * shall consider the ability of the interested party to submit the information * * * and *may modify such requirements to the extent necessary to avoid imposing an unreasonable burden on that party.*

Continued

Arrighi did not describe exactly what form of information it could provide; but it did offer to supply any "limited information that Commerce felt might be worthwhile or helpful." *Letter from Finer Foods to Commerce* (Oct. 20, 1997), at 9, Finer Foods' App., Tab 3, at 9. At that point, Commerce should have offered Arrighi some guidance. It did not do so.

Because Arrighi offered to submit what it could, the burden shifted to Commerce to consider Arrighi's ability to respond with some specificity and to modify its requirements, if necessary. 19 U.S.C. § 1677m(c)(2). Instead, Commerce focused on Arrighi's failure to provide a specific counter-proposal and questioned the veracity of Arrighi's certified statement that it did not have the financial resources or personnel to provide the information Commerce required. *Final Results*, 64 Fed. Reg. at 6616. Commerce discounted Arrighi's explanation that it had lost 30–40% of its total sales after Commerce imposed a 21.34% dumping margin in the original antidumping investigation; that it had laid off a significant number of employees; and that it no longer had the personnel or resources to compile the information Commerce sought even if Finer Foods were to pay for the legal and expert fees. *Letter from Finer Foods to Commerce* (Oct. 20, 1997), at 7–8, Finer Foods' App., Tab 3, at 7–8. Commerce called this "merely * * * a business decision not to allocate resources to this task." *Final Results*, 64 Fed. Reg. at 6616.

Finer Foods' points out that Arrighi's situation is comparable to Flores Estrella's situation in *Certain Fresh Cut Flower from Colombia*, 59 Fed. Reg. 15,159, 15,174 (Dep't Commerce 1994) (final results). At the time Flores Estrella received Commerce's questionnaire, the company had laid off 40 workers and was facing the possibility of liquidation. *Id.* at 15,173–74. Commerce was not able to "conclude that Flores Estrella was incapable of responding to the questionnaire. Nonetheless, [Commerce] recognize[d] that the company was subject to financial and personnel constraints at that time." *Id.* at 15,174. Additionally, Flores Estrella, like Arrighi, made a similar offer to provide partial information. *Id.* Commerce never responded to Flores Estrella's offer to cooperate. *Id.* Commerce decided not to apply the first tier BIA rate to Flores Estrella based on Flores Estrella's offer to cooperate and Commerce's own failure to follow up on this offer. *Id.*

Commerce's complete disregard of the information provided by Arrighi, as well as its failure to respond in any way to Arrighi's offer of limited assistance similarly precludes Commerce from imposing punitive adverse facts available. Although Arrighi had not yet suggested a specific alternative form to submit the information as required by 19 U.S.C. § 1677m(c)(1), this was not a situation where the information was readily available in some other form. Commerce has an obligation to assist interested parties experiencing difficulties and "*shall* provide to such

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(2) Assistance to interested parties

The administering authority * * * shall take into account any difficulties experienced by interested parties, particularly small companies, in supplying information requested by the administering authority or the Commission in connection with investigations and reviews under this subtitle, and *shall provide to such interested parties any assistance that is practicable in supplying such information*.

19 U.S.C. § 1677m(c) (emphasis added).

interested parties any assistance that is practicable in supplying such information." 19 U.S.C. § 1677m(c)(2) (emphasis added). Commerce did not suggest any way to avoid a totally adverse margin and provided no assistance to Arrighi even though Arrighi offered to cooperate in providing a simpler form of the information required. *See also Allied Signal Aerospace Co. v. United States*, 996 F.2d 1185, 1192 (Fed. Cir. 1993)(holding impermissible application of first-tier BIA (adverse inference) to company that offered to cooperate but Commerce never responded to offer of cooperation).

Commerce has not followed the appropriate steps to reach an adverse inference from the facts available.[3] Commerce might have gotten some information from Arrighi if it had responded to Arrighi's offer of cooperation. Only at that point could it decide if the offer was genuine, if the information was sufficient, and whether best efforts had been made or not. Commerce's response to Arrighi was crucial in this case. Arrighi, which had left the market, did not have the normal incentives to cooperate, leaving the importer, Finer Foods, in a difficult position, as it alone would bear the full impact of increased duties.[4] In such a situation, it is imperative that Commerce respond to overtures of cooperation from the exporter/producer.[5]

The court also disagrees with Commerce's refusal to consider the information submitted by Finer Foods. The information meets all of the criteria set forth in 19 U.S.C. § 1677m(e) for the use of information.[6] Commerce did not reject Finer Foods' submissions based on any of the five statutory criteria but stated generally that "it was insufficient for purposes of calculating a dumping margin for Arrighi in accordance with the statute." *Final Results*, 64 Fed. Reg. at 6620. Commerce is re-

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[3] The court has repeatedly brought to Commerce's attention the new statutory scheme restricting the application of an adverse inference pursuant to 19 U.S.C. § 1677e(c). *See F. LLI De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, No. 99-1318, 2000 U.S. App. Lexis 14148, *13 (Fed. Cir. June 16, 2000) ("Commerce's discretion in these matters * * * is not unbounded.") [hereinafter "*De Cecco*"]. Commerce is required to make subtler judgments supported by substantial evidence in the agency record and must pay attention to the burden allocation in §1677m(c). *See e.g., Ferro Union, Inc. v. United States*, 44 F. Supp.2d 1310, 1329 (Ct. Int'l Trade 1999).

[4] As the producer, Arrighi normally would try and obtain the lowest dumping margin possible in an effort to be able to sell at a competitive price. In this case, though, Arrighi had received a dumping margin in the prior administrative review that was so high that it precluded further exports to the U.S. market. *See Certain Pasta from Italy*, 61 Fed. Reg. 38,547, 38,548 (Dep't Commerce 1996) (setting Arrighi's final weighted average dumping margin at 21.34%); *and Letter from Finer Foods to Commerce* (Oct. 20, 1997), at 6–9, Finer Foods' App., Tab 3, at 6–9. Thus, Arrighi no longer had the usual "incentive" to cooperate with either Finer Foods or Commerce. As the importer of record, Finer Foods would be responsible for paying the dumping duty and bear the onus of any perceived failure of Arrighi to cooperate. *See* 19 C.F.R. § 141.1(b) (1998) ("[L]iability for duties * * * constitutes personal debt due from importer to the United States."); *see also* 19 C.F.R. § 351.402(f) (2000).

[5] Even where Commerce may use adverse facts available, obtaining as much information as possible might provide a better basis for corroborating a substitute margin. Nonetheless, the court does not hold that every general overture of cooperation warrants a response from Commerce. The court's ruling is based on the particular situation affecting Arrighi and its importers.

[6] Section 1677m(e) provides in relevant part:

> In reaching a determination * * * the administering authority * * * *shall not decline to consider information that is submitted by an interested party* and is necessary to the determination but does not meet all the applicable requirements established by the administering authority * * * if—
>
> (1) the information is submitted by the deadline established for submission,
> (2) the information can be verified,
> (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,
> (4) the interested party has demonstrated that it has acted to the best of its ability in providing the information and meeting the requirements established by the administering authority * * * with respect to the information, and
> (5) the information can be used without undue difficulties.

19 U.S.C. § 1677m(e) (emphasis added).

quired to consider the information submitted even though it "does not meet all the applicable requirements established by the administrative authority." 19 U.S.C. § 1677m(e). Thus, even though Commerce could not use the information to determine the normal value, the information that Finer Foods provided indicated that Arrighi likely would not have received a high margin, and certainly not a margin as high as the one selected by Commerce. *See Letter from Finer Foods to Commerce* (Mar. 10, 1998), at 1–3, Finer Foods' App., Tab 4, at 1–3. Commerce has not indicated that this information, though limited, is unreliable for the narrow purpose for which it was submitted.[7] Commerce shall reconsider the information provided by Finer Foods and determine an appropriate facts available rate for Arrighi.[8]

II. Corroboration of Adverse Facts Available Rate

BACKGROUND

Finer Foods and Barilla[9] contest Commerce's adoption of the highest margin from the petition as the adverse facts available rate. They claim its selection violates 19 U.S.C. § 1677e(c).[10]

To corroborate the petition margin, Commerce used individual transaction margins from the original less than fair value ("LTFV") investigation. *Commerce's Memorandum to File* (Feb. 3, 1999), at 2, C.R. Doc. 120, Finer Foods' App., Tab 6, at 2. Because a few of these specific transaction margins exceeded 71.49% (the highest petition margin), Commerce determined that the highest petition rate was corroborated. *Id.* at 2–3, Finer Foods' App., Tab 6, at 2–3. Commerce next compared the petition rate with specific transaction margins calculated for fully cooperative respondents in this administrative review and found that the petition rate fell within the range of individual transaction margins calculated. *Final Results*, 64 Fed. Reg. at 6,621. Commerce concluded that the petition rates represented a reasonable estimate of the level of dumping that occurred during the period of review. *Commerce's Memorandum to File* (Feb. 3, 1999), at 3, Finer Foods' App., Tab 6, at 3. Commerce claims that the use of petitioners' margin is corroborated by the individual transaction margins from the LTFV investigation. Barilla and Finer Foods challenge this finding.

The court's determination in the preceding section prevents application of the petition margin to Arrighi. The issue is outstanding as to Barilla.

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[7] [ ]

[8] The court understands that at this point a substitute margin likely will be required, but it may not be the entirely adverse margin selected by Commerce.

[9] Barilla never responded to Commerce's questionnaire. *Final Results*, 64 Fed. Reg. at 6616. Barilla does not challenge Commerce's use of adverse facts available, instead it limits its challenge to the corroboration of the adverse facts available rate.

[10] 19 U.S.C. § 1677e(c) provides:

> When the administering authority or the Commission relies on secondary information rather than on information obtained in the course of an investigation or review, the administering authority or the Commission, as the case may be, shall, to the extent practicable, corroborate that information from independent sources that are reasonably at their disposal.

DISCUSSION

Pursuant to 19 U.S.C. § 1677e(c), Commerce must corroborate secondary information it relies on "to the extent practicable" from independent sources reasonably at its disposal. Both the Antidumping Agreement of GATT 1994 and the URAA indicate that secondary information is to be corroborated. The Antidumping Agreement requires Contracting Parties use secondary sources with "special circumspection" and to check secondary information from other "independent sources," including published price lists, official import statistics, customs returns or information from other interested parties. Annex II at ¶ 7, *reprinted in* U.S. Trade Representative, *Final Texts of the GATT Uruguay Round Agreements* 168–69 (1994). The Statement of Administrative Action ("SAA") further clarifies that "secondary information may not be entirely reliable" and that "[c]orroborate means that the agencies will satisfy themselves that the secondary information to be used has probative value." SAA accompanying the URAA, H.R. Rep. No. 103–826(I) at 870, *reprinted in* 1994 U.S.S.C.A.N. at 4199. The SAA specifically singles out the information contained in the petition as an example of unreliable information because it is based upon unverified allegations. *Id.*

In keeping with these guidelines, the court instructed Commerce in *Ferro Union* that: 1) Commerce cannot apply a margin that has been discredited; and 2) Commerce must select a margin which bears a rational relationship to the matter to which it is to be applied. 44 F. Supp.2d at 1334–35 (citations omitted). Barilla correctly notes that the petitioners' margins were not corroborated and had been previously discredited in this court's review of the original antidumping duty order. *De Cecco*, No. 99–1318, 2000 U.S. App. Lexis 14148 at *15. The petitioners' margin, considered inherently suspect by the SAA, is further suspect in this review because the calculated rates for all parties participating in this review have fallen even further. *Compare Certain Pasta from Italy*, 61 Fed. Reg. at 38,548 (final LTFV investigation margins ranged from 0.67% to 21.34%), *with Final Results*, 64 Fed. Reg. at 6,630–31 (final admin. rev. margins ranged from 0.32% to 12.26%). A bare possibility does exist that Barilla's overall margin may be in the very high range selected by Commerce because that possibility cannot be eliminated without verifying its own data. The improbability that the hypothesis is true, however, is demonstrated by the low margins of all respondents, and the trend of those margins.

In corroborating the petitioners' margin, Commerce is under an obligation to use data that bears a rational relationship to the matter to which it is applied. *De Cecco*, No. 99–1318, 2000 U.S. App. Lexis 14148 at *19 ("By requiring corroboration of adverse inference rates, Congress clearly intended that such rates should be reasonable and have some basis in reality."); *see also Ferro Union*, 44 F. Supp.2d at 1334. Here, Commerce used individual transactions from other respondents without explaining: (1) whether these transactions represented a significant

portion of the transactions at issue; and (2) how these transactions related to a rational dumping duty margin for Barilla. Commerce nevertheless concluded from these random, apparently aberrant transactions of other respondents that exceeded 71.49%[11] that the margin alleged in the petition is corroborated. *Final Results*, 64 Fed. Reg. at 6,620–21. The original LTFV investigation in this matter involved an extremely large sales database from a number of respondents. It is highly unlikely that the petition margin, which was so far from the calculated margins of both the original investigation and this administrative review, had any validity at all. Without evidence to support Commerce's use of the individual transaction margins as corroboration, the court cannot uphold the use of these apparently aberrant transactions as corroboration for petitioners' margin. Therefore, Commerce shall reconsider the adverse facts available margin with respect to Barilla. Commerce shall determine a margin that, although adverse, bears some rational relationship to the current level of dumping in the industry and shall provide proper corroboration explaining the probative value of the data used in determining the adverse facts available margin.

III. Distinguishing New Information From Clerical Or Ministerial Error Correction

Background

La Molisana's original submission to Commerce correctly indicated in the narrative that it was the importer of record on *most* sales. *Questionnaire Response to Sections A-D* (Nov. 10, 1997), at C–43, C.R. Doc. 11, La Molisana's App., Tab A–1, at 2. The computer tape, though, originally recorded Company A,[12] as the importer of record for all sales in the U.S. market. *Corrections to La Molisana's Questionnaire Response* (Dec. 15, 1997), at 3, C.R. Doc. 20, La Molisana's App., Tab A–2, at 3. La Molisana submitted a new U.S. market sales tape indicating that La Molisana was the importer of record for all U.S. market sales. *Id.* at 2, La Molisana's App., Tab A–2, at 2.

On March 23, 1998, La Molisana again attempted to correct the confusion surrounding the importer of record. *La Molisana's Supplemental Questionnaire Response* (Mar. 23, 1998), at C–11, C.R. Doc. 45, La Molisana's App., Tab A–3, at 2. La Molisana's narrative correctly explained that La Molisana was the importer of record for certain entries but Com-

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[11] To corroborate the petition rate, Commerce examined the transaction margins from five respondents that fully cooperated in the original LTFV investigation. *Commerce's Memorandum to File* (Feb. 3, 1999), at 2, Finer Foods' App., Tab 6, at 2. From those transactions, Commerce focused on the 25 highest calculated transaction margins of only [] of the five respondents to justify the use of the petitioners' margin. *Id.* [] *Id.* at 3, Finer Foods' App., Tab 6, at 3. Commerce used these transactions to determine that "the petition rates represent a reasonable estimate of a level of dumping that occurred during the POI." *Id.* The original LTFV investigation, though, covered well over a million individual observations. *See e.g., Letter from De Cecco to Commerce* (Feb. 15, 1996), at 4, P.R. Doc. 689, De Cecco's App. in Ct. No. 96–08–01970, Tab 31, at 4 (reporting over 900,000 observations to Commerce); *Delverde's Section B and C Response, App. B–2* (Sept. 14, 1995) (reporting 283,977 observations to Commerce), at 37, P.R. Doc. 275, De Cecco's App. in Ct. No. 96–08–01970, Tab 38A, at 1; *La Molisana's Section B Response, App. B–1* (Sept. 13, 1995), C.R. Doc. 63, De Cecco's App. in Ct. No. 96–08–01970, Tab 57, at 1 (reporting [] observations to Commerce). Commerce's use of a few arbitrarily selected transactions, where such an extensive database of information exists to test the petition margin, does not constitute sufficient corroboration.

[12] Company A is []. *Corrections to La Molisana's Questionnaire Response* (Dec. 15, 1997), at 3, C.R. Doc. 20, La Molisana's App., Tab A–2, at 3.

pany A was the importer of record for all entries designated "FOB, Port of Naples". *Id.* The U.S. market sales tape, though, remained uncorrected and designated La Molisana as importer of record for all U.S. sales.

La Molisana did not realize this inconsistency existed until after the Preliminary Result was published on August 7, 1998.[13] La Molisana explained that the correction would not affect Commerce's margin calculation.[14] *Letter from La Molisana to Commerce* (Oct. 27, 1998), at 2, La Molisana's App., Tab. B–1, at 2.

Commerce rejected La Molisana's October 27th letter as an untimely submission of new factual information. *Letter from Commerce to La Molisana* (Dec. 2, 1998), at 1–2, La Molisana's App., Tab B–2, at 1–2. Pursuant to 19 C.F.R. §351.301(b)(2) (1998),[15] the deadline for submitting new factual information was January 15, 1998 and Commerce argues that La Molisana's submission was more than 10 months late. *Id.* Commerce also rejected La Molisana's argument that the corrections should be accepted as clerical error because they were untimely and unreliable.[16] Commerce published the Final Results without correcting the alleged error. *See Final Results*, 64 Fed. Reg. at 6,615.

La Molisana next submitted a timely request for correction of ministerial error after the final results are published. *Letter from La Molisana to Commerce* (Feb. 17, 1999), at 1, C.R. Doc. 122, La Molisana's App., Tab A–6, at 1. Commerce again rejected this request, stating that the requested correction consisted of new information. *Memorandum from Commerce to Richard Moreland* (Mar. 11, 1999), at 2, C.R. Doc. 125, La Molisana's App., Tab A–7, at 2. La Molisana now appeals to this court for relief.

DISCUSSION

Factual information includes "information in questionnaire responses, publicly available information to value factors in nonmarket economy cases, allegations concerning market viability * * * and upstream subsidy allegations." 19 C.F.R. § 351.301(a)(1999). Ministerial error, on the other hand, is "an error in addition, subtraction, or other arithmetic function, clerical error resulting from inaccurate copying,

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[13] | |

[14] | |

[15] Section 351.301(b)(2) provides, in pertinent part that a submission of factual information is due no later than 140 days after the last day of the anniversary month.

[16] Commerce accepts clerical corrections if all the following conditions are satisfied:

(1) the error in question must be demonstrated to be a clerical error, and not a methodological error, an error in judgment, or a substantive error;
(2) Commerce must be satisfied that the corrective documentation provided in support of the clerical error allegation is reliable;
(3) the respondent must have availed itself of the earliest reasonable opportunity to correct the error;
(4) the clerical error allegation, and any corrective documentation, must be submitted to Commerce no later than the due date for the respondent's administrative case brief;
(5) the clerical error must not entail a substantial revision of the responses;
(6) the respondent's corrective documentation must not contradict information previously determined to be accurate at verification.

Certain Fresh Cut Flowers from Colombia, 61 Fed. Reg. 42,833, 42,834 (Dep't Commerce 1996). The Department determined that elements (2) and (4) are not satisfied. *Letter from Commerce to La Molisana* (Dec. 2, 1998), at 1–2, La Molisana's App., Tab B–2, at 1–2.

duplication, or the like and *any other similar type of unintentional error which the Secretary considers ministerial.*" 19 C.F.R. § 351.224(f) (1999) (emphasis added).

In this case, the U.S. market sales tape in the original questionnaire response contained errors due to an inaccurate supply of information. Commerce characterizes La Molisana's corrections as new factual information. La Molisana, in contrast, characterizes the information as clerical errors due to inaccurate copying. La Molisana argues that Commerce has abused its discretion by refusing to allow this clerical or ministerial error correction. The court agrees.

Where the line is difficult to draw between permissible ministerial or clerical error correction and impermissible factual or methodological changes, based upon Commerce's past practice, it should have classified the error here as clerical or ministerial error. First, Commerce acknowledged the "general inconsistency with respect to the database field in question." *Letter from Commerce to La Molisana* (Dec. 2, 1998), at 2, La Molisana's App., Tab B–2, at 2. Therefore, when La Molisana offered to correct its incorrect computer tape to match the narrative that had been submitted to address this inconsistency, it simply sought to rectify an error that is apparent from the agency record.

Second, Commerce's refusal to accept the information because it is "unreliable" is unjustified. Ordinarily there is no verification of submissions in an administrative review. Therefore, there is no reason for Commerce to infer greater reliability in the information initially submitted as opposed to the information submitted for corrective purposes. Further, in this case the error was fully explained and La Molisana offered corroboration that Company A was an importer during the POR, though Company A was not specifically listed as one of La Molisana's importers. *F. LLI De Cecco Di Filippo Fara San Martino S.P.A. v. United States*, No. 96–08–01930, Ex. A (Ct. Int'l Trade Oct. 23, 1997) (listing Company A as one of the importers during the improper provisional period). Moreover, Commerce has offered no evidence that indicates that the information received was unreliable. Thus, Commerce has not substantiated its finding that La Molisana's corrected information failed to meet the second criteria in its six-part clerical error test, that the corrected information was reliable.

La Molisana correctly notes that the facts of this case are parallel to *NTN Bearing Corp. v. United States*, 74 F.3d 1204 (Fed. Cir. 1995). In *NTN*, the plaintiff mistakenly included in its U.S. sales database four sales which were actually sales to a Canadian customer for goods that never entered the United States. *See NTN*, 74 F.3d at 1208. Commerce did not dispute that this error was clerical. Similarly, in this case, La Molisana erroneously stated that it was the importer of record for pasta it did not import. La Molisana, like the *NTN* plaintiff, was fully cooperative in the course of the review and submitted the necessary and correct information requested by Commerce, except that it failed to incorporate a portion of this information in its tape. "[D]raconian penalties are

[in]appropriate for the making of clerical errors" because they are mere inadvertencies, and "[w]hile the parties must exercise care in their submissions, it is unreasonable to require perfection." *Id.* at 1208. Commerce's refusal to adopt the correction violates the notion that dumping margins are to be determined "as accurately as possible." *Id.* (citing *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, at 1191 (Fed. Cir. 1990)) (quotations omitted).

Moreover, as La Molisana has argued, making the correction imposes little burden on Commerce. Commerce only had to correct the specified lines in the assessment rate[17] calculation program and then rerun it. *Letter from La Molisana to Commerce* (Oct. 27, 1998), at 4–5, La Molisana's App., B–1, at 4–5. La Molisana has set forth the exact corrections to the computer program in its October 27, 1997 letter to Commerce. *Id.* It would "neither have required beginning anew nor have delayed making the final determinations." *NTN*, 74 F.3d at 1208. Use of the mistakenly submitted information would be punitive to La Molisana. Here, a simple adjustment in the assessment program is all that was required to serve the dumping duty's "remedial" rather than "punitive" purpose. *See id.* (citation omitted).

The court recognizes the tension between finality and correct result. *See NTN*, 74 F.3d at 1208. La Molisana, though, has been trying to make this same correction from the time of the publication of the preliminary results. At the time La Molisana requested the correction, the tension between finality and correctness simply did not exist. *See id.* at 1208 (citation omitted). Further, as this matter is remanded for other reasons, there appears to be no administrative efficiency reason to perpetuate the error.

Commerce must re-calculate the assessment rate for La Molisana.

CONCLUSION

For the foregoing reasons, the court remands this matter to Commerce to: 1) determine an appropriate facts available rate for Arrighi; 2) reconsider the adverse facts available margin with respect to Barilla and assess a dumping margin that, while adverse, bears a rational relationship to the probability of dumping; and 3) re-calculate the assessment rate for La Molisana.[18]

Remand results are due within 45 days. Objections are due 20 days thereafter, responses 11 days thereafter.

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[17] La Molisana is asking Commerce to comply with the methodology set forth in 19 C.F.R. § 351.212(b) (1999). Commerce "normally will calculate an assessment rate for each importer of subject merchandise covered by the review. [Commerce] normally will calculate the assessment rate by dividing the dumping margin found on the subject merchandise examined by the entered value of such merchandise for normal customs duty purposes. [Commerce] will instruct the Customs Service to assess antidumping duties by applying the assessment rate to the entered value of the merchandise." 19 C.F.R. § 351.212(b).

[18] Specifically, [ ].

(Slip Op. 00–73)

BESTFOODS (FORMERLY KNOWN AS CPC INTERNATIONAL, INC.), PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 95–02–00144

[This case was remanded from the United States Court of Appeals for the Federal Circuit to permit plaintiff to "pursue any other arguments it may have as to why it should not be required to mark its product under the applicable [marking] regulations." Plaintiff's new argument on remand is that the exclusion of its finished peanut butter (and most other agricultural products) from the *de minimis* exception to the tariff shift rules under 19 C.F.R. § 102.13(b) is unlawful, arbitrary, capricious, and an abuse of discretion. The argument is sustained.]

(Decided June 28, 2000)

Neville, Peterson & Williams (*John M. Peterson*, *George W. Thompson*, and *Curtis W. Knauss*, Esqs.) for plaintiff.

David W. Ogden, Acting Assistant Attorney General; *David M. Cohen*, Director, and *Jeanne E. Davidson*, Deputy Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Armando O. Bonilla*, Attorney); Of Counsel: *David R. Hamill*, Attorney, Department of the Treasury, Office of General Counsel; *Sandra L. Bell*, Supervisory Attorney Advisor and *Monika R. Brenner*, Attorney Advisor, United States Customs Service, Office of Regulations and Rulings, for defendant.

OPINION

INTRODUCTION

WATSON, *Senior Judge:* This action is before the court on remand from the United States Court of Appeals for the Federal Circuit in *Bestfoods (formerly known as CPC International, Inc.) v. United States*, 165 F. 3d 1371 (Fed. Cir.), *cert. denied*, 120 S. Ct. 42 (1999). Familiarity with the prior proceedings in this case is presumed.

Briefly, in *Bestfoods*, the appellate court ruled, *inter alia*, that the North American Free Trade Agreement ("NAFTA") "tariff shift" rules, 19 C.F.R. § 102.20, and Customs Regulation 19 C.F.R. § 134.35(a) and (b), are valid, and remanded the case to this court "to permit Bestfoods to pursue any other arguments it may have as to why it should not be required to mark its product ['Skippy' brand peanut butter] under the applicable regulations." 165 F. 3d at 1376.

There is no dispute in the current proceedings that Canadian peanut slurry does not undergo a change in tariff classification ("tariff shift") under the specific Marking Rule under Part 102 of the Customs Regulations (*see* section 102.20) applicable to peanut butter. Bestfoods, however, contends that to the extent it will be able to demonstrate that Canadian peanut slurry used in making peanut butter at its U.S. facilities is present in *de minimis* amounts, as defined under 19 C.F.R. § 102.13(a), it should not be required to mark its finished product as a product of Canada (or other equivalent country of origin marking designation) pursuant to the NAFTA Marking Rules and the Marking Statute, 19 U.S.C. § 1304(a).

Specifically, Bestfoods contests the validity of 19 C.F.R. § 102.13(b), which excludes most agricultural products, including peanut slurry,

from the *de minimis* exception to the tariff shift rules, as arbitrary, capricious, an abuse of discretion, and otherwise contrary to law. As discussed *infra*, Customs seeks to justify the reasonableness of the exclusion of most agricultural products from *de minimis* treatment under section 102.13(b) on the basis of health and food safety concerns.

The Customs regulation in issue, Section 102.13 (19 C.F.R. § 102.13), so far as relevant, provides as follows:

> (a) Except as otherwise provided in paragraphs (b) and (c) of this section, foreign materials that do not undergo the applicable change in tariff classification set out in Sec. 102.20 or satisfy the other applicable requirements of that section when incorporated into a good shall be disregarded in determining country of origin of the good if the value of those materials is no more than 7 percent of the value of the good or 10 percent of the value of the good of Chapter 22, Harmonized System.
>
> (b) Paragraph (a) of this section does not apply to a foreign material incorporated in a good provided for in Chapter 1, 2, 3, 4, 7, 8, 11, 12, 15, 17, or 20 of the Harmonized System.

PARTIES' CONTENTIONS

Bestfoods has no quarrel with the application of the *de minimis* exception to the tariff shift rules under section 102.13(a), and argues that to the extent that it can demonstrate that its finished peanut butter qualifies for such *de minimis* treatment, plaintiff should not be required to mark its finished peanut butter as a product of Canada.[1] Plaintiff further contends that Customs' exclusion from *de minimis* treatment of certain Chapters of the Harmonized Tariff Schedule covering mostly agricultural products, pursuant to section 102.13(b), should be declared by the court to be null and void as arbitrary, capricious, an abuse of discretion, and not otherwise in accordance with law within the purview of the Administrative Procedure Act, 5 U.S.C. §§ 553, 706(2).

Defendant contends, first, that the Federal Circuit remanded this case for the limited purpose of affording Bestfoods an opportunity to challenge only the application of the Marking Rules, but not to challenge the validity of any Rule. Hence, defendant argues, plaintiff's challenge to the validity of section 102.13(b) is outside the scope of the Federal Circuit's remand order. Second, defendant contends that in any case, the NAFTA Marking Rules were correctly applied by Customs in its Headquarters Ruling and that section 102.13(b) is within Customs' discretionary authority.

ISSUES PRESENTED

Whether Bestfoods' challenge to the validity of section 102.13(b) of the Customs Regulations is within the scope of the Federal Circuit's re-

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[1] Bestfoods notes that the administrative record in this case (in connection with the contested preimportation ruling) represented to Customs that by *volume*, the amount of Canadian peanut slurry that plaintiff intends to use in making its finished peanut butter will be as little as 10 percent of the total *volume* of peanut slurry in the finished product. Further, Bestfoods represented that all costs of value-added processing of the peanut butter are incurred in the United States. Thus, plaintiff now represents that "even though a particular lot of finished peanut butter may contain more than 7 percent of Canadian material by volume, the Canadian material will often account for less than 7 percent of the *value* of the [finished] peanut butter." *Pltf's Mem.* at 3, n. 4 (emphasis in original).

mand order; and if so, whether the exclusion of peanut butter and most other agricultural products from the *de minimis* exception to the tariff shift rules under 19 C.F.R. § 102.13(b) was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, as claimed by Bestfoods.

After careful review of the post-remand submissions of the parties, and for the reasons set forth hereinafter, the court sustains Bestfoods' arguments.

DISCUSSION

1.

DEFENDANT'S CONTENTION THAT PLAINTIFF'S ARGUMENTS EXCEED THE SCOPE OF THE REMAND

In *Bestfoods*, the Federal Circuit rejected plaintiff's challenges to the validity of the NAFTA Marking Rules' tariff-shift methodology, reversed in part, vacated in part, and remanded the case broadly permitting Bestfoods to pursue "any other arguments it may have as to why it should not be required to mark its product under the applicable regulations." 165 F. 3d at 1376. Plaintiff now seeks to challenge the validity of the exclusion of most agricultural products from the *de minimis* exception to the tariff shift rules pursuant to section 102.13(b) on the grounds that the reasons advanced by Customs (set forth *infra*) are arbitrary, capricious, an abuse of discretion, and otherwise contrary to law. Defendant, however, contends that Bestfoods' new challenge to the validity of a regulation is outside the scope of the permissible issues plaintiff may raise on remand.

Contrary to defendant's narrow reading of the remand order of the Federal Circuit, the court broadly permitted Bestfoods to pursue *any other arguments in may have* as to why it should not be required to mark its product under the applicable regulations, which remand order plainly does not preclude further arguments challenging the validity of a particular NAFTA Marking Rule. The specific issue now raised by plaintiff as to the validity of the exclusion of agricultural products under section 102.13(b) was not before the appellate court prior to remand.

2.

THE CHALLENGED EXCLUSIONS UNDER SECTION 102.13(b)

Section 102.13 of the Customs Regulations is a so-called "*de minimis*" rule. The principle of *de minimis non curat lex*, often shortened to *de minimis*, is long established in law generally, including customs and international trade law, and is a bedrock principle of statutory construction. *See Alcan Aluminum, Inc. v. United States*, 165 F.3d 898 (Fed. Cir. 1999) ("Alcan") and cases cited. *See also Varsity Watch Co. v. United States*, 34 CCPA 155, C.A.D. 359 (1947); *Overton & Co. v. United States*, 5 Ct. Cust. Appls. 183 (1914); *John S. Connor, Inc. v. United States*, 54 Cust. Ct. 213, C.D. 2536 (1965); *Canada Dry Ginger Ale, Inc. v. United* States, 43 Cust. Ct. 1, C.D. 2094 (1959); and *R.W. Gresham v.*

United States, 3 Cust. Ct. 308, C.D. 263 (1939). The principle simply means that the law does not concern itself with trifles, *see also Black's Law Dictionary*, Seventh Ed. 1999, page 443, and has been applied in a variety of statutory contexts. There is no dispute that the *de minimis* principle may also be applied under the Marking Statute and NAFTA tariff shift rules, and the issue before the court arises only from Customs' withholding of the *de minimis* principle from the tariff shift rules with respect to most agricultural products.

In response to commenters that expressed concern that the *de minimis* rule set forth in section 102.13 was made inapplicable to certain agricultural products, Customs explained, *inter alia*, that due to the nature of the products and because of health and food safety concerns, Customs exercised its discretion not to allow a *de minimis* standard to apply to country of origin determinations of most agricultural products. Continuing, Customs posited that the exclusion of most agricultural products from *de minimis* treatment for purposes of country of origin determinations was consistent with Customs' "past practice with regard to country of origin determinations of agricultural products." *See* 61 Fed. Reg. at 28,937.

Customs' articulated rationale is somewhat scanty, and the agency did not state that prior to section 102.13(b) there had been a past practice of withholding *de minimis* treatment from tariff shift rules, or explain how the exclusion of the *de minimis* exception from the tariff shift rules with respect to agricultural products furthers the purpose of the Marking Statute or NAFTA Marking Rules, or indeed, even explain how the requirement of a stringent application of the tariff shift rules for NAFTA agricultural products addresses Customs' health and food safety concerns.

Defendant's post-remand submissions do not satisfactorily respond to the critical issues raised by Bestfoods going the reasonableness of a regulation, but defendant merely insists that Customs exercised its discretion and followed past practice. The court is not persuaded from defendant's submissions that Customs had the authority or discretion alleged to jettison the *de minimis* exception to the tariff shift rules with respect to agricultural goods for reasons of health and food safety; or that the foregoing action was consistent with past practice; or that the withholding of *de minimis* treatment furthers the purpose of the Marking Statute and Marking Rules; or even that excluding the *de minimis* exception from the tariff shift rules with respect to most agricultural products reasonably addresses Customs' health and food safety concerns.

There is nothing in NAFTA Annex 311, the NAFTA Implementation Act, or the Marking Statute itself, to suggest that Customs has any discretion to address health and food safety concerns with respect to most agricultural products under the Marking Rules, and certainly not by withholding *de minimis* treatment from the tariff shift rules for deter-

mining country of origin.[2] The Congressional intent and purpose of country of origin marking under section 304(a) of the Tariff Act of 1930, as amended, is straightforward and largely self-evident from the plain language of the statute, which requires that articles of foreign origin imported into the United States, or their containers, be permanently marked *so as to indicate to an ultimate purchaser in the United States the English name of the article's country of origin.* While the identity of the "ultimate purchaser" of a good may be a matter of dispute, there can be no dispute that the purpose of the statute is limited to informing an "ultimate purchaser" of an article in the United States of the foreign articles' country of origin lest that knowledge influence his or her decision to purchase the article. *See United States v. Friedlaender & Co.*, 27 CCPA 297, C.A.D. 104 (1940); *Koru North America v. United States*, 701 F. Supp. 229 (CIT 1988); and *Globemaster, Inc. v. United States*, 68 Cust. Ct. 77 (1972). While the Marking Statute requires that the ultimate consumer be informed by the required marking of a good's country of origin, the statute does not, and cannot, address the myriad of reasons or motivations for consumer's country of origin preferences, biases, or prejudices as to particular goods, or the goods generally of a particular country. Moreover, it appears that the health and food safety concerns related to agricultural products that Customs sought to address in excluding *de minimis* treatment from the tariff shift rules were concerns of *Customs* and not those of the *ultimate purchasers* in the United States.

Contrary to defendant's assertion, the withholding of *de minimis* treatment from the NAFTA tariff shift methodology with respect to most agricultural goods grounded on health and food safety concerns does not further the clear, but limited, purpose of either the Marking Statute or the NAFTA Marking Rules. Other statutory provisions and regulations administered by Customs jointly with the Department of Health and Human Services, Food and Drug Administration, and the Department of Agriculture specifically address and regulate health and safety of food and agricultural products, and health and food safety concerns do not fall within the purview of regulation by Customs under the rubric of the Marking Statute or an exclusion of *de minimis* treatment from the NAFTA tariff shift rules with respect to most agricultural products.[3]

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[2] Plaintiff further objects that denial of *de minimis* treatment to the application of the tariff shift rules leads to potential results for its finished peanut butter that are absurd and anomalous. For example, plaintiff posits that exclusion of *de minimis* treatment from the tariff shift rules under section 102.13(b) will result in requiring that plaintiff's finished peanut butter that may contain Canadian peanut slurry comprising only .000001 percent of the value of the finished peanut butter be marked as a product of Canada.

[3] It would appear to this court that Customs and the agencies having direct responsibility for health and food safety regarding imported agricultural products (Dept. of Agriculture and Food and Drug Administration) could effectively address any health and food safety concerns with respect to NAFTA agricultural imports without Customs' exclusion of *de minimis* treatment from the tariff shift rules under section 102.13(b). Essentially, that exclusion results only in the stringent application of the tariff shift rules to agricultural products for purposes of country of origin marking, and does not address health and food safety concerns. Simply requiring Bestfoods to mark finished peanut butter containing *de minimis* Canadian peanut slurry as a product of Canada would not effectively address Customs' (or its cooperating agency's) health and food safety concerns, and clearly will not inform an ultimate consumer of the finished product concerning any health or food safety problems related to any *de minimis* Canadian peanut slurry content of the finished product.

Congress implemented NAFTA through the North American Free Trade Agreement Implementation Act, Pub. L. 103–122, 107 Stat. 2057 (1993) ("NAFTA Implementation Act"). That Act, and its accompanying *Statement of Administrative Action*, H.R. Doc. No. 103–159, vol. 1, 103d Cong., 1st Sess. 1993) ("SAA"), authorize the promulgation of such regulations "as necessary or appropriate *to implement immediately applicable U.S. obligations under the NAFTA," and those "necessary or appropriate to carry out the actions proposed in the statement of administrative action.*" 19 U.S.C. § 3314(b) (emphasis added). The foregoing "obligations" and "actions proposed" did not address health or food safety concerns related to agricultural products. Moreover, even if the NAFTA Implementation Act or SAA had anything to suggest that the NAFTA Marking Rules should address health and food safety concerns with respect to NAFTA agricultural products, it would seem most unreasonable for Customs to seek to address such concerns by withholding *de minimis* treatment under the NAFTA tariff shift methodology for determining country of origin.

NAFTA Annex 311 entitled "Country of Origin Marking," specifically authorized the Parties to "establish by January 1, 1994, rules *for determining whether a good is a good of a Party* ('Marking Rules') for purposes of this Annex, Annex 300–B and Annex 302.2, and *for such other purposes as the Parties may agree.*" *See* NAFTA Annex 311, ¶¶ 1, 2 (emphasis added). Following the enactment of the NAFTA Implementation Act, Customs promulgated regulations containing the NAFTA Marking Rules, which rules are codified at 19 C.F.R. Part 102 and 19 C.F.R. § 134.35(b). Those regulations correctly employ the "tariff shift" methodology for determining whether goods have undergone "substantial transformation" following their importation, and therefore, do not need to be marked to indicate their foreign origin.[4] *See Bestfoods*, 165 F. 3d at 1372.

Section 102.13 of the NAFTA Marking Rules augments the tariff shift rules under section 102.20 by a *de minimis* exception. The salutary purpose of the *de minimis* rule was addressed *supra*. Nonetheless, under section 102.13(b) Customs excluded from the *de minimis* exception to the tariff shift rules certain Chapters of the Harmonized Tariff Schedule, including Chapter 20, into which plaintiff's peanut slurry and peanut butter fall. There is no dispute that the excluded Chapters under section 102.13(b) cover mostly agricultural products, including peanut slurry.

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[4] An article imported from a NAFTA country will be considered to have undergone a "tariff shift" only if the processing or manufacturing steps in the United States are sufficient to change the article's tariff classification. *See Bestfoods*, 165 F. 3d at 172. Thus, in determining whether a foreign article has undergone the requisite tariff shift under section 102.20, Customs first determines the tariff classifications for both the foreign material and the finished article. *See* 59 Fed. Reg. 110, 112 (1994). In this case, the relevant rule in section 102.20 states: "A change to subheading 2008.11 from any other chapter, provided that change is not the result of mere blanching of peanuts." *See* 19 C.F.R. § 102.20(d). Bestfoods does not argue that it should not be required to mark its product because a tariff shift occurred under section 102.20. Since it is undisputed that both peanut slurry and finished peanut butter are classified in subheading 2008.11, the specified tariff shift did not occur when the peanut slurry was processed into peanut butter. Customs, therefore, concluded that Bestfoods was not the "ultimate purchaser" of the Canadian peanut slurry, within the meaning of the Marking Statute, and that therefore, Bestfoods' finished peanut butter incorporating the imported peanut slurry had to be marked to reflect its Canadian origin. *Bestfoods*, 165 F. 3d at 172.

Citing T.D. 91–7 concerning "Tariff Treatment and Country of Origin Marking of Sets, Mixtures and Composite Goods," and T.D. 89–66 concerning "Country of Origin Marking of Imported Fruit Juice Concentrate," defendant posits that in promulgating the NAFTA Marking Rules, specifically section 102.13, Customs formally codified Customs' past practice, which allegedly did not provide for *de minimis* treatment of most agricultural products for the reasons Customs explained in 61 Fed. Reg. at 28,937 (*viz.*, health and food safety). *Deft's Mem.* at 8. Defendant insists that Customs' exclusion of *de minimis* treatment with respect to most agricultural goods for reasons of health and food safety constitutes a reasonable exercise of the agency's discretion.

Plaintiff, however, maintains that "the unique and bizarre *de minimis* provisions of the NAFTA Marking Rules [with respect to agricultural products] are not the continuation of any longstanding administrative practice. Indeed they appear to be contrary to past Customs' practice." Thus, plaintiff points up Customs Headquarters Ruling 735085 of June 4, 1993, which states: "To the extent such foreign [vegetable] materials are insignificant, or would have no influence on the purchasing decision, Customs applies a 'common sense' approach to require marking only of those articles which are more than *de minimis* significance."]. *Pltf's Mem.* at 9–10.

Without discussing the specific issues addressed in T.D. 91–7 and 89–66, it suffices to state that the rulings relied on by defendant do not demonstrate the alleged past practice of excluding most agricultural products from *de minimis* treatment for reasons of health or food safety. However, irrespective of Customs' past practice, nothing has been called to the court's attention that remotely suggests that Customs' exclusion of *de minimis* treatment under the tariff shift Marking Rules with respect to agricultural products for reasons of health or food safety were in response to any authority or discretion granted in NAFTA Annex 311, the NAFTA Implementation Act, or that the exclusion of *de minimis* treatment from the tariff shift rules for reasons of health and food safety under section 102.13(b) in any way furthers the purpose of the Marking Statute or Marking Rules.

Demonstrating that Customs' denial of *de minimis* treatment at odds with the purposes of the statute being implemented is unreasonable and unlawful, plaintiff calls attention to the rationale of the Federal Circuit in *Alcan Aluminum Corp. v United States*, 165 F.3d 898 (Fed. Cir. 1999). There, the Federal Circuit addressed Customs' absolute refusal to apply "the well-recognized doctrine of de minimis non curat lex" to the tariff shift requirements in the context of determining whether Alcan's unwrought aluminum ingots originated in Canada for purposes of preferential trade treatment (a reduced merchandise processing fee) under the United States-Canada Free-Trade Agreement Implementation Act of 1988. Alcan asserted that the imported aluminum ingots, comprised of both Canadian and non-Canadian materials, underwent the requisite transformation, thus constituting the goods as "originating" in Canada,

and subject to a preferential merchandise processing fee. Customs, however, disagreed and imposed the full (nonpreferential) merchandise processing fee because a "trivially small" amount—comprising less than 1 percent by weight and value—of grain refiner used in the production of the ingots did not undergo a tariff classification shift, as required by the HTSUS.

Alcan argued that the tariff shift methodology must be applied in light of the *de minimis* principle. In other words, because only a small amount of the imported goods did not perform the required tariff shift, Alcan asked that the court hold that under the *de minimis* rule, the goods met the tariff shift requirements. Defendant insisted that the *de minimis* principle was irrelevant.

Citing *Wisconsin Department of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 231 (1992) ("de minimis * * * is part of the established background of legal principles against which all enactments are adopted, and * * * which all enactments are deemed to accept"), the Federal Circuit in *Alcan* stressed that the courts have recognized the principle in a wide variety of statutory contexts, and that the great weight of authority *compelled* recognition of the principle under the tariff shift rules before the *Alcan* court. The Federal Circuit, citing the ruling of the Supreme Court in *Wisconsin Department of Revenue* establishing that the *de minimis* principle applies absent indication in the statute to the contrary, *see* 505 U.S. at 231–32, observed that "we discern no reason why, in the absence of explicit language [in the statute] precluding application, the normal operation of the *de minimis* principle should be abandoned." 165 F. 3d at 905.

Moreover, stressing the purpose of the governing statute in *Alcan* (preserve preferential trading treatment for Canadian goods), the resulting harsh consequences of imposing a *de facto* trade barrier, and the odd or absurd results of Customs' absolute refusal to apply the *de minimis* rule, the Federal Circuit held that Customs' refusal was "unreasonable and contrary to law." *Id.* at 903–04. Interestingly, even the dissenting opinion by Chief Judge Mayer agreed with the majority view recognizing the importance of the statute's purpose when applying the *de minimis* principle, citing *Wisconsin Dept. of Revenue*, *supra*. *Alcan*, 165 F.3d at 906.

There can be no doubt that absent an explicit expression of legislative intent to the contrary, as a matter of fundamental fairness and reasonable statutory interpretation, there is an implied recognition of the *de minimis* principle under the governing statute; indeed, absent explicit expression of legislative intent to the contrary, a very heavy burden falls on a party which insists that the purpose of the underlying statute compels abandonment of the *de minimis* rule.

Defendant seeks to distinguish *Alcan* on the basis that the appellate court construed a different governing statute, which leaves open the "possibility" that the rule may not need to be applied in the current case. *Deft's Mem.* at 11. While in *Alcan* the Federal Circuit applied the *de*

minimis principle in the context of a statute creating a trade preference, the decision emphasizes that the rule has a very broad and fundamental application in a variety of contexts, that it is the normal rule for statutory interpretation, and that in any event, the rule may not lawfully be cast aside by Customs when to do so thwarts the purpose of the underlying statute.

While *Alcan* involved Customs' refusal to apply the *de minimis* rule in the context of preferential treatment of Canadian goods, the rationale in applying *de minimis* in *Alcan* is equally compelling here in the context of effectuating the purpose of the Marking Statute and Marking Rules. As indicated above, the purpose of the Marking Statute and Marking Rules is fulfilled by informing the ultimate consumer of a good of the country of origin; any health or food safety concerns *of Customs* related to agricultural products, while they may be relevant to other statutes and regulations administered by Customs cooperatively with other agencies,[5] fall outside the purpose of country of origin marking under the Marking Statute and NAFTA Marking Rules. Accordingly, the court agrees with Bestfoods that Customs' health and food safety concerns related to agricultural products could not lawfully or reasonably be addressed by withholding application of the *de minimis* principle from the tariff shift methodology.

Defendant further posits that the exclusion of agricultural products from the *de minimis* exception to the tariff shift rules under section 102.13(b), is "essentially commensurate" with NAFTA Chapter 4 Preference Rules, specifically Annex 405, which expressly excludes certain agricultural products from *de minimis* treatment under the Chapter 4 Preference Rules of Origin. *See* 19 U.S.C. § 3332(e)(5)(1996). Defendant's attempt to bootstrap section 102.13(b) of the Marking Rules implementing NAFTA Annex 311 into the Preference Rules of Origin is unavailing. As aptly pointed out by plaintiff, the NAFTA Preference Rules of Origin and NAFTA Marking Rules speak to different purposes: the Chapter 4 Preference Rules of Origin were adopted to determine when goods shall be considered as "originating" products of the country of exportation eligible for preferential treatment, and under the terms of the Agreement the Parties to NAFTA expressly elected to adopt a stringent rule of origin for preferential treatment on a discriminatory

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[5] Defendant recognizes the cooperative enforcement of federal law by Customs may also involve certain concerns for which the Federal Trade Commission bears responsibility. *Deft's Mem.* at 14, n. 12. While proper country of origin marking pursuant to 19 U.S.C. § 1304(a) and the NAFTA Marking Rules is, of course, the responsibility of Customs, cooperative agency efforts concerning health and food safety, are not properly regulated by Customs under the Marking Statute and NAFTA Marking Rules, but rather such concerns are within the purview of the statutes and regulations for which the Food and Drug Administration and Department of Agriculture bear prime responsibility. Consequently, notwithstanding that Customs cooperates with other agencies in addressing health and food safety concerns related to agricultural products, Customs overstepped its authority by seeking to address such concerns under the Marking Statute and NAFTA Marking Rules by excluding *de minimis* treatment from the tariff shift rules pursuant to section 102.13(b).

However, even assuming *arguendo* that Customs has the authority to address health and food safety concerns under the Marking Statute or NAFTA Marking Rules, it is extremely dubious that denial of *de minimis* treatment under the tariff shift rules for purposes of determining when a good is a "good of a party" pursuant to NAFTA Annex 311 or a "good of the United States under the NAFTA Marking Rules," 19 C.F.R. §134.35(b), *see also* 19 C.F.R. §§ 102.11(3) and 102.20, is a reasonable approach to addressing health and food safety concerns given the purpose of the Marking Statute and Marking Rules.

basis. The *de minimis* rule for purposes of the Preference Rules or Origin is, therefore, totally irrelevant to Customs exclusion of *de minimis* treatment under the tariff shift Marking Rules. With respect to determining when goods are the goods of party for purposes of Marking Rules, NAFTA Annex 311 authorizes the tariff shift methodology, and does not expressly withhold *de minimis* treatment under the tariff shift rules.

Significantly, too, as pointed out by plaintiff, had the NAFTA Parties intended that the *de minimis* rule of Annex 405 be also applied to Annex 311, they could have easily so provided, in which event Customs' health and food safety rationale for excluding the *de minimis* exception from the tariff shift rules would be irrelevant. On the contrary, while NAFTA Annex 311 does not specifically address *de minimis* treatment under the tariff shift methodology, it does express an intent that NAFTA parties shall "in adopting, maintaining and applying any measure relating to country of origin marking, minimize the difficulties, costs and inconveniences that the measure may cause to the commerce and industry of the other parties." *See* NAFTA Annex 311(4). Customs' exclusion from the *de minimis* exception to the tariff shift rules of most agricultural products pursuant to section 102.13(b), ostensibly for health and food safety reasons, was palpably inconsistent with the express objectives of Annex 311 and the Marking Rules and an unreasonable approach for addressing Customs' health and food safety concerns.

The NAFTA Marking Rules are conceded by plaintiff to be "interpretive" in nature. Defendant urges, correctly, that judicial deference is owed to reasonable interpretive agency regulations. Fundamentally, an agency's *reasonable* interpretive regulations are entitled to deference by the court. *Haggar Apparel Co. v. United States*, 526 U.S. 380 (1999), citing *Chevron Corporation v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

However, judicial deference to interpretive regulations (and certain rulings) does not absolve the court from determining the reasonableness of agency interpretation. *See* this court's recent decision in *Genesco Inc. v. United States* (CIT Slip Op. 00–57, 2000 WL 710 304, May 23, 2000). In *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 26 (1982), the Supreme Court observed that a "[r]egulation is not a reasonable statutory interpretation unless it harmonizes with the statute's 'origin and purpose'." (Quoting *National Muffler Dealers Ass'n, Inc. v. U.S.*, 440 U.S. 472, 477 (1979).

Defendant has failed to persuade this court that exclusion of most agricultural products from the *de minimis* exception to the tariff shift rules for health and food safety reasons is consistent with, or furthers the purpose of, either the Marking statute or the NAFTA Marking Rules, or that excluding *de minimis* treatment from the tariff shift rules reasonably addresses Customs' health and food safety concerns related to NAFTA agricultural products. There being no other justification by defendant for excluding most agricultural products from the *de minimis*

exception to the tariff shift rules (other than the cryptic references to "the nature of" the goods excluded and an alleged "past practice" of not applying *de minimis* treatment to agricultural products), the court is constrained to agree with Bestfoods argument that section 102.13(b) is arbitrary, capricious, an abuse of discretion, and otherwise contrary to law. Accordingly, plaintiff should be given the opportunity to demonstrate that when its finished peanut butter contains Canadian peanut slurry whether or not the finished product qualifies for *de minimis* treatment under 19 C.F.R. § 102.13(a) and should not be subject to marking under 19 U.S.C. § 1304(a) to show a foreign country of origin.

CONCLUSION

This action was remanded to permit plaintiff to pursue any additional arguments as to why it should not be required to mark its finished peanut butter under the applicable regulations. Contrary to defendant's contention, plaintiff's additional arguments are within the scope of the remand.

This court has concluded that Customs' health and food safety concerns in connection with most NAFTA agricultural products, while they may be relevant to and addressed by other statutes and regulations cooperatively enforced by the Customs Service and other agencies, Customs overstepped its authority in addressing health and food safety concerns by excluding *de minimis* treatment from the tariff shift rules with respect to most agricultural products under section 102.13(b). For all the other reasons stated above, plaintiff's argument on remand that 19 C.F.R. § 102.13(b) is arbitrary, capricious, an abuse of discretion, and otherwise contrary to law is sustained.[6]

A judgment will be entered accordingly.

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[6] The court observes that the issue of "severability," *see Schnitzer Steel Products Co. v. United States*, 45 Cust. Ct. 173, C.D. 2220 (1960) (where separate subdivisions of a regulation are independent and mutually exclusive, any invalidity of one portion does not destroy the validity of the other), has not been raised, and the court takes no position on the issue. However, under the rationale of *Alcan*, even in the absence of a *de minimis* regulation, *de minimis* treatment under the tariff shift rules should be implied.

(Slip Op. 00–74)

MANNESMANN-SUMERBANK BORU ENDUSTRISI T.A.S., BORUSAN BIRLESIK BORU FABRIKALARI A.S., AND BORUSAN ITHALAT IHRACAT VE DAGITIM A.S., PLAINTIFFS *v.* UNITED STATES OF AMERICA, DEFENDANT, AND ALLIED TUBE & CONDUIT CORP. AND WHEATLAND TUBE CO., DEFENDANT-INTERVENORS

Court No. 98–05–02185

(Dated July 5, 2000)

JUDGMENT ORDER

GOLDBERG, *Judge:* Upon consideration of the Department of Commerce's *Final Results of Redetermination on Remand Pursuant to Mannesmann-Sumerbank Boru Endustrisi T.A.S. v. United States, Slip Op.00–50 (CIT May 3, 2000)*, June 1, 2000 ("Remand Results"), and all other papers filed herein, and no parties having filed comments regarding the Remand Results, it is hereby

ORDERED that the Remand Results are sustained in all respects.

(Slip Op. 00–75)

CANVAS & LEATHER BAG CO., INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 97–02–00354

Plaintiff, Canvas & Leather Bag Company, Inc., pursuant to U.S. CIT R. 60(b)(1) and (6), moves the Court to relieve plaintiff of an order of dismissal issued June 6, 2000, and to reinstate the above-captioned action to the Suspension Disposition Calendar.

Defendant, United States, opposes the motion arguing plaintiff has failed to provide sufficient reasons justifying the relief sought.

Held: This Court denies plaintiff's motion finding plaintiff has failed to proffer sufficient reasons justifying relief.

(Dated July 5, 2000)

Neville, Peterson & Williams (Curtis W. Knauss and *John M. Peterson)*, New York, New York, for plaintiff.

David W. Ogden, Acting Assistant Attorney General of the United States; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Barbara M. Epstein)*, for defendant.

OPINION

CARMAN, *Chief Judge:* Plaintiff, Canvas & Leather Bag Company, Inc., pursuant to U.S. CIT R. 60(b)(1) and (6), moves the Court to relieve

plaintiff of an order of dismissal issued June 6, 2000, and to reinstate the above-captioned action to the Suspension Disposition Calendar. Defendant, United States, opposes the motion arguing plaintiff has failed to provide sufficient reasons justifying the relief sought.

BACKGROUND

Plaintiff commenced this action to appeal denial by the U.S. Customs Service of protests covering entries of soft-sided cooler bags by filing a summons on February 27, 1997. On October 9, 1997, this action was suspended pending the resolution of the designated test case, *SGI, Inc. v. United States*, Court No. 92–05–00359. Following the decision in *SGI, Inc. v. United States*, 122 F.3d 1468 (Fed. Cir. 1997), this action was placed on the Court's Suspension Disposition Calendar pursuant to U.S. CIT R. 85.

This action has been dismissed four times for lack of prosecution pursuant to U.S. CIT R. 85(d) which provides that an action not removed from the Suspension Disposition Calendar within the established period shall be dismissed for lack of prosecution without further direction of the Court. This Court has reinstated this action three times. In the motion at bar, plaintiff requests the Court again reinstate this action to the Court's Suspension Disposition Calendar.

Plaintiff argues it has been diligent in prosecuting this action. In its motion, plaintiff asserts it submitted proposed stipulated judgments on agreed statements of fact to defendant and reasonably expected that defendant would submit the proposed stipulated judgments to this Court. According to plaintiff, however, defendant did not submit the proposed stipulated judgments nor alert plaintiff the stipulations had not been filed with the Court.

Defendant opposes plaintiff's motion and contests plaintiff's characterization of the facts. Defendant asserts that through numerous telephone calls and letters it advised plaintiff of the problems with the various proposed stipulated judgments as well as reminded plaintiff of the deadline to remain on the Suspension Disposition Calendar. In particular, defendant points to its letter to plaintiff's counsel dated May 31, 2000, which specifically informed plaintiff that the previously granted extension for this case to remain on the Suspension Disposition Calendar expired on "April 30, 2000 (and/or March 1st or May 1st)." (*See* Letter from Barbara M. Epstein to John M. Peterson, Esq., at 1, *attached to* Def.'s Resp. to Pl.'s Mot. to Vacate Order of Dismissal and Reinstate to the Suspension Disposition Calendar.) Defendant advised plaintiff to take appropriate steps to obtain an out-of-time extension so the parties might be able to file a stipulation with the Court. Moreover, defendant argues, regardless of defendant's degree of cooperation, plaintiff has an independent obligation to prosecute its case. Defendant contends plaintiff has provided no valid reasons why it did not monitor the status of the case and file a motion to extend time for the case to remain on the Suspension Disposition Calendar.

DISCUSSION

A plaintiff has an independent and primary obligation to prosecute an action brought by it "from the moment of commencement to the moment of final resolution." *Avanti Prods., Inc. v. United States*, 16 CIT 453, 453 (1992). "That primary responsibility never shifts to anyone else and entails the timely taking of all steps necessary for its fulfillment." *Id.* at 453–54. If an action is dismissed for lack of prosecution, however, the Court may, upon motion of the plaintiff, and "upon such terms as are just, * * * relieve a party * * * from a final judgment * * * for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; * * * or (6) any other reason justifying relief from the operation of the judgment." U.S. CIT R. 60(b).

In the absence of any acceptable excuse that would justify the relief sought under U.S. CIT R. 60(b), a dismissal should not be set aside, and the action should not be restored to the Suspension Disposition Calendar. *See Avon Prods., Inc v. United States*, 13 CIT 670, 671–72 (1989); *see also Avanti Prods.*, 16 CIT at 453. In this matter, plaintiff provides no valid reason for the Court to vacate the order of dismissal and reinstate this action. Plaintiff essentially argues it failed to prosecute because it was awaiting responses to draft stipulations served on the government. Allowing an action to be dismissed for lack of prosecution because a plaintiff was waiting for the United States to respond to draft stipulations is not an acceptable excuse under CIT Rule 60(b). *See Caterpillar, Inc. v. United States*, No. 97–04–00598, 1998 WL 928441, at *1 (CIT Dec. 29, 1998). Moreover, the Court notes the government in its May 31, 2000 letter to the plaintiff notified the same that the Court's docket sheet indicated that the extension for the case to remain on the Suspension Disposition Calendar had expired and recommended plaintiff take action to obtain an out-of-time extension in order that the stipulation could be filed with the Court. In light of the facts before this Court and for the reasons stated above, plaintiff's motion for relief from an order of dismissal and reinstatement of the action is hereby denied.

(Slip Op. 00–76)

HOLLAND HITCH CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 98–05–02133

(Dated July 5, 2000)

FINAL JUDGMENT ORDER

WATSON, *Senior Judge:* Upon reading plaintiff's motion for partial summary judgment, upon consideration of defendant's response and consent to final judgment regarding plaintiff's principal classification under subheading 8708.99.80, HTSUS, for parts and accessories of motor vehicles, and defendant's consent to duty-free treatment of the entry covered by this action under this classification pursuant to the Automotive Products Trade Act ("APTA"), upon consideration of other papers and proceedings had herein, it is hereby:

ORDERED that this final judgment for plaintiff is to be entered by the Clerk of the Court, and it is further

ORDERED that the Customs Service shall reliquidate entry number 144–3488499–6, under subheading 8708.99.80, HTSUS, providing for duty-free treatment under the APTA, and make refund with any interest provided for by law.

[PUBLIC VERSION]

(Slip Op. 00–77)

POHANG IRON AND STEEL CO., LTD., POHANG COATED STEEL CO., LTD., AND POHANG STEEL INDUSTRIES CO., LTD., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND NATIONAL STEEL CORP., U.S. STEEL GROUP—A UNIT OF USX CORP., INLAND STEEL INDUSTRIES, INC., BETHLEHEM STEEL CORP., AND LTV STEEL CO., INC., DEFENDANT-INTERVENORS

NATIONAL STEEL CORP., ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND POHANG IRON AND STEEL CO., LTD., ET AL., DEFENDANT-INTERVENORS, AND UNION STEEL MANUFACTURING CO. LTD., DEFENDANT-INTERVENOR

Consolidated Court No. 98–04–00906

[Antidumping duty remand determination affirmed in part and remanded in part.]

(Dated July 6, 2000)

Akin, Gump, Strauss, Hauer & Feld, LLP (Sukhan Kim, Spencer S. Griffith, J. David Park, and *Sydney H. Mintzer)* for the POSCO Group.

David W. Ogden, Acting Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Michele D. Lynch), Linda S. Chang*, and *Bernd G. Janzen*, Office of the Chief Counsel for Import Administration, Department of Commerce, of counsel, for defendant.

Dewey Ballantine LLP (Michael H. Stein, Bradford L. Ward, Jennifer Danner Riccardi and *Andrew J. Conrad)* for National Steel Corporation, *et al.*

Kaye, Scholer, Fierman, Hays & Handler, LLP (Donald B. Cameron, Julie C. Mendoza and *Paul J. McGarr)* for Union Steel Manufacturing Co., Ltd.

OPINION

RESTANI, *Judge:* This matter is before the court following remand. *See Final Results of Redetermination Pursuant to Court Remand: Pohang Iron and Steel Co., Ltd. v. United States, Consol. Ct. No. 98–04–00906* (Feb. 22, 2000) [hereinafter "*Remand Results*" or "*RR*"]. The court ordered the United States Department of Commerce ("Commerce" or "the Department") to explain or reconsider (1) its determinations that the Posco Group's[1] U.S. sales were constructed export price ("CEP") sales as opposed to export price ("EP") sales, (2) U.S. indirect selling expenses for the Posco Group, and (3) Union Steel Manufacturing Co., Ltd.'s ("Union") claim of free U.S. warehousing for one verification observation. *Pohang Iron and Steel Co. v. United States*, No. 98–04–00906, 1999 WL 970743, at *19 (Ct. Int'l Trade Oct. 20, 1999) [hereinafter "*Pohang I*"]. Familiarity with the court's prior opinion herein is presumed. *See id.* The issues will be addressed in reverse order.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (1994). In reviewing final determinations in antidumping duty investigations and reviews, the court will hold unlawful those agency determinations which are unsupported by substantial evidence on the record, or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B) (1994).

DISCUSSION

I. *Union Warehousing Expense*

Although Commerce complains mightily that the court has required an unreasonable amount of verification activity or evidentiary support for its conclusion that Union had no warehousing expense for a particular sale, the court disagrees. *See RR* at 17–20 & 46. The particular aspect of the verification at issue involved a very small sample. *Pohang I*, 1999 WL 970743, at *15. In such a situation, the individual observations are important. It was the verifiers' obligation to state their conclusions accurately, whether based on oral statements or documentary evidence. Further, they needed to include in the record enough of a trail for the court to determine if their conclusions were supported.

In this case, a domestic industry participant discovered a disconnect in the verification report. *Id.* at *16. It was up to the parties to resolve this issue by reference to the record the first time the issue was presented to the court. The explanation provided at that time was incomplete and partially incorrect. *Id.* at *18. On remand, review of the record revealed that a different Union sales contractual arrangement from the one originally discussed applied to the observation at issue, Observation

[1] The plaintiffs herein, Pohang Iron and Steel Co., Ltd. ("POSCO"), Pohang Coated Steel Co., Ltd. ("POCOS") and Pohang Steel Industries Co., Ltd. ("PSI") are collectively referred to as the "POSCO Group".

83.[2] *RR* at 45. Either the company's statement to the verifier or the verifier's report of it contained errors or ambiguities. *Id.* at 44–45.

When the supporting documentation reveals contradictions or commercially nonsensical practices in a respondent's explanations, the verifier cannot simply accept them and move on, as Commerce seems to assert. *See Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938) (finding that substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion"). In any case the ambiguity has now been resolved by reference to sales information of record which is discussed in confidential footnote 2. As the court found no problems with the rest of the verification as to warehousing expenses, Commerce's determination on this issue is now sustained.

II. *POSCO Group's U.S. Indirect Selling Expenses*

Because the POSCO Group, adhering to its position that use of CEP information was not appropriate, specifically declined on at least two occasions to provide information on U.S. indirect selling expenses, Commerce used facts available. *Pohang I*, 1999 WL 970743, at *14. The court has already approved the use of facts available for POSCO, if an adjustment is necessary in U.S. indirect selling expenses to account for an interest expense. *See id.* at *15. POSCO asserts that such an adjustment is neither necessary nor permissible. It states that Commerce improperly changed its methodology after the final results had issued to include the interest expense, and that Commerce did not simply correct a ministerial error. *Id.* at *14. The court found Commerce's explanation wanting and remanded the issue. *Id.* at *15.

Commerce has now embraced the suggestion from the court that perhaps its indirect selling expense calculation involved a partial adverse facts available selection. *Id.* at *15, *see also Remand Results*, at 14–17. Indeed, the court has no problem with that selection because there is no reason to believe POSCO could not have complied with Commerce's request, and POSCO's decision not to comply was purposeful. Accordingly, use of adverse facts available was permissible under 19 U.S.C. § 1677e(b) (1994). The threshold problem, however, is that Commerce is permitted to change the indirect expenses calculation after the final results are issued only if Commerce originally calculated such expenses incorrectly because of ministerial error. *See* 19 U.S.C. § 1675(h) (1994) (ministerial errors to be corrected within a reasonable time after final determinations are issued).

On remand, Commerce clarified that it intended to include a number of items in indirect expenses even though under normal circumstances it might exclude those items in order to avoid double counting of expenses already counted, e.g., as direct expenses. *RR* at 40–42. Because POSCO did not submit specific CEP indirect expense information, Commerce alleges that it cannot be certain that double counting would occur.

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[2] The contract reviewed by Commerce with respect to observation 83 apparently was between [ ] and [ ], a Union customer. *RR* at 45. The Union sales contract terms were [ ]. Presumably Union would incur no warehousing expenses in such a situation.

Id. at 41–42. Therefore, this alleged uncertainty with respect to double counting caused Commerce, in fulfilling the adverse inference it had drawn, to include the interest expense at issue in indirect selling expenses. *Id.* Commerce, however, failed to program its computer accordingly. *Id.* The type of correction Commerce describes is a ministerial error correction. *See* 19 C.F.R. § 351.224(f) (1999) (noting that arithmetic function is ministerial error).

As to a related adjustment, in its remand determination Commerce failed to clarify expressly, as instructed by the court, why it rejected *POSCO's* own claim of ministerial error as to bank charges and commissions adjustments to indirect sales expenses. *RR* at 37. The court nevertheless surmises from Commerce's explanation as to interest that certain commissions and bank charges also were included in the original final results calculation because of Commerce's belief that there was a lack of POSCO information demonstrating double counting. Thus, Commerce concluded no post-final results ministerial error change in POSCO's favor was warranted.[3]

It is probably reasonable in a facts available situation, and clearly so in an adverse facts available setting, to put the risk of double counting on the delinquent party. This would be the normal result of drawing an adverse inference. POSCO alleges, however, that there was adequate data in the record to make *clear* that Commerce's method double counted. Commerce cannot use information which is known to be incorrect. *D & L Supply Co. v. United States*, 113 F.3d 1220, 1223 (Fed. Cir. 1997). Thus, the question now presented to the court is whether the record demonstrates that Commerce incorrectly included POSCO's interest expenses in the U.S. indirect selling expenses figure.[4]

First, Commerce normally makes a direct selling expense adjustment based on an *imputed* credit expense for individual sales, which it did here. The imputed credit expense, which is not a separate actual expense figure, is excluded from the total interest expense figure used to calculate indirect selling expenses. *New Minivans from Japan*, 57 Fed. Reg. 21,937, 21,956–57 (Dep't Commerce 1992) (final LTFV det.) (excluding imputed credit expense on individual sales as part of indirect selling expenses); *see also Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany*, 56 Fed. Reg. 31,692, 31,721 (Dep't. Commerce 1991) (final results of antidumping duty admin. rev.) (Commerce "reduced interest expense on the firm's books for a portion of [imputed credit] expense * * * to avoid double-counting."). The court sees no reason which would justify this known double counting here. No specific additional information from POSCO is necessary to eliminate this particular double counting.

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[3] In Commerce's supplemental brief, it confirms that the treatment in methodology as to claimed corrections for both interest and bank charges and commissions is consistent, as the court surmised. Commerce's Supp. Br. at 2 (May 17, 2000). Because Commerce intended to include bank charges and commissions there was no ministerial error which could be corrected post-final results as to commissions and bank charges, and POSCO's claim fails. *Ministerial Analysis Memorandum* (Apr. 15, 1998), at 3, P.R. Doc. 216, Def.'s *Pohang I* Public App., Ex. 18, at 2.

[4] The court does not hold that such specific partial adverse facts available data must be used, but Commerce chose this method and must follow all facts available procedures that flow from its choice.

Nonetheless, the court accepts Commerce's explanation that it may make some indirect selling expense adjustment with respect to interest expenses because it lacks the information to determine if the imputed credit deduction covered all sales-related interest expenses. *See RR* at 42. Accordingly, while here the imputed credit figure must be subtracted from the total interest figure, interest expenses may generally be included in the indirect selling expense adjustment where the respondent has not provided full CEP expense data.

Second, POSCO asserts that the interest figure largely relates to non-subject merchandise, that Commerce's allocation of interest expenses between subject and non-subject is incorrect, and that interest expenses should be allocated based on the relationship that a specific non-subject merchandise business asset bears to total assets.[5] Commerce is not required to use this method of allocation if it is already allocating interest expenses on another acceptable subject—non-subject merchandise basis.

The problem is that the ratio of subject merchandise revenue to total revenue may not account for the revenue generated by the separate business asset because this figure may not be included in the POSCO group's balance sheets. *See* Commerce's Supp. Br. at 12–13 (May 17, 2000). Commerce states it cannot tell which interest expenses are related to the separate business asset and cannot deduct such interest expenses from the total to be allocated. Thus, it implies that it accepts the possibility that its allocation may be distortive.

Had POSCO submitted all the data required by Commerce, the court might be sympathetic to its arguments that Commerce does not need any more information because it can allocate on an asset basis, and that Commerce never requested the data. Had Commerce received all the information it requested, it might have been led to ask for this additional data. It also seems improper under adverse inference circumstances to require Commerce to abandon its normal allocation methods because POSCO's methods might be better. *AK Steel Corp. v. United States*, 988 F. Supp. 594, 606 (Ct. Int'l Trade 1997) ("[T]he [c]ourt's role is not to determine whether the information chosen was the 'best' actually available.") (quotation omitted), *aff'd* 1999 U.S. App. Lexis 15023 (Fed. Cir. 1999). Further, because of the odd financial structure at issue and POSCO's lack of cooperation, the court cannot say that Commerce is incorrect in focusing on debt financing as opposed to taking a broader view of financing. Accordingly, Commerce is not required to allocate the interest expense on the basis of the relationship of the separate business asset to total assets.

Third, POSCO objected that the normal practice of deducting interest income from interest expenses was not followed. POSCO did not explain its objections in terms of specific calculations, clarify whether only short term interest was at issue or whether interest income was deducted

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[5] The specific business asset is [ ]. POSCO's Comments on Remand at 11–16.

from imputed credit. Despite Commerce's lack of response on this point, the court finds POSCO's objection insufficient.[6]

Finally, the court finds arguments with respect to freight expenses and other periods of review irrelevant to this matter. Accordingly, for purposes of the indirect selling expenses adjustment, Commerce shall adjust the interest expense figure removing previously deducted imputed credit expenses.

III. *Use of Constructed Export Price for POSCO Group's U.S. Sales*

All parties agree that the Federal Circuit's decision in *AK Steel Corp. v. United States* impacts this case. 203 F.3d 1330 (Fed. Cir. 2000). It involves the same parties, the same product, and the same commercial patterns. In *AK Steel*, the Federal Circuit rejected Commerce's long-standing three-part test for selecting EP versus CEP treatment for U.S. sales. *Id.* at 1339–40. The court held that the additional words of 19 U.S.C. § 1677a (1994), "outside the United States" and "by a seller affiliated with the producer" in the respective definitions of EP and CEP are significant. *Id.* at 1337. It found that the additional words invalidated the prior administrative practice; whereas this court, in the absence of contrary legislative history, had recognized the additional words to be mere clarification. *Compare AK Steel*, 203 F.3d at 1338–39, *with AK Steel Corp. v. United States*, 34 F. Supp.2d 756, 762 (Ct. Int'l Trade 1998), *aff'd in part, rev'd in part by* 203 F.3d 1330. The Court of Appeals declared the statute wholly unambiguous and unambiguously eliminated Commerce's three-part test to determine whether sales by domestic affiliates rendered the sales subject to EP or CEP treatment. *AK Steel*, 203 F.3d at 1337–40.

No one has asserted that the U.S. sales at issue were not made pursuant to contracts signed by the U.S. affiliates and the U.S. customers in the United States. Under *AK Steel*'s geographic approach, the sales are subject to CEP treatment.[7] That is all that remains of this issue and further remand, as the domestic parties request, would serve no purpose in this case.

CONCLUSION

This matter is remanded to correct the indirect selling expenses adjustment as stated in this opinion. Remand is due within 30 days. The parties may object within 11 days thereafter.

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[6] Only in its response to Commerce's supplemental brief did POSCO make its objection to the remand results on this issue with any specificity. This was too late.

[7] The court does not mean to imply that a U.S. affiliate and a U.S. customer could sign a contract in the Barbados to avoid CEP treatment. If both contractual parties are U.S. entities operating in the U.S. under *AK Steel*, the sale will be a CEP sale. *See AK Steel*, 203 F.3d at 1339–40.

[PUBLIC VERSION]

(Slip Op. 00–78)

GOURMET EQUIPMENT (TAIWAN) CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND CONSOLIDATED INTERNATIONAL AUTOMOTIVE, INC., DEFENDANT-INTERVENOR

Court No. 99–05–00262

[Antidumping determination affirmed.]

(Dated July 6, 2000)

Ablondi, Foster, Sobin & Davidow, P.C. (James Taylor, Jr., Mitchell W. Dale, and *Sarah M. Nappi)* for plaintiff.

David W. Ogden, Acting Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Michele D. Lynch), Robert E. Nielsen*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

Nalls & Associates (Charles H. Nalls and *Michael J. Caridi)* for defendant-intervenor.

OPINION

RESTANI, *Judge:* This matter is before the court on a Motion for Judgment on the Agency Record, pursuant to USCIT Rule 56.2, by Gourmet Equipment (Taiwan) Corp. ("Gourmet"). The determination under review is *Chrome-Plated Lug Nuts from Taiwan*, 64 Fed. Reg. 17,314 (Dep't Commerce 1999) (final results of antidumping duty admin. rev.) [hereinafter "*Final Results*"]. Gourmet argues that the United States Department of Commerce ("Commerce" or "the Department") erred in refusing to conduct a verification of Gourmet's reported cost and sales data, despite Gourmet's alleged independent substantiation of the information submitted to Commerce. Gourmet also argues that Commerce erred in applying total adverse facts available to determine Gourmet's dumping margin on the ground that the information provided by Gourmet in its questionnaire responses was unverifiable pursuant to both 19 U.S.C. §§ 1677e(a)(2)(D) and 1677e(b) (1994).

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (1994). The court must uphold Commerce's final determination unless it is "unsupported by substantial evidence on the record or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1994).

BACKGROUND

On October 30, 1997, Commerce published a notice of initiation of the sixth administrative review of an antidumping duty order on chrome-plated lug nuts ("CPLN") from Taiwan. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 62 Fed. Reg. 58,705 (Dep't Commerce 1997). The period of review ("POR") was September 1, 1996 through August 31, 1997. *Id.* Commerce sent questionnaires to

eighteen companies, including Gourmet. *Chrome-Plated Lug Nuts from Taiwan*, 63 Fed. Reg. 53,875, 53,875 (Dep't Commerce 1998) (preliminary results of antidumping duty admin. rev.) [hereinafter "*Preliminary Results*"]. Questionnaires sent to seven of the companies were returned as undeliverable. *Id.* These firms received the "all others" rate of 6.93 percent, which was established in the less than fair value ("LTFV") investigation. *Id.* Those firms that did not respond to the questionnaire, or whose submissions were substantially deficient, were given an adverse margin of 10.67 percent, the highest rate from the LTFV investigation. *Id.* at 53,875–76.

Gourmet provided a timely response to Commerce's questionnaire on December 23, 1997. *Questionnaire Response* (Dec. 23, 1997), P.R. Doc. 13, Pl.'s App., Tab 8. Commerce sent Gourmet a supplemental questionnaire requesting audited financial statements and additional information in order to reconcile the costs and sales reported in Gourmet's questionnaire response with its audited financial statements. *Supplemental Questionnaire* (Feb. 11, 1998), at 1, P.R. Doc. 17, Pl.'s App., Tab 9, at 3. Gourmet responded that its financial statements for the POR had not been audited, and that although the statements provided to the Taiwanese government as tax returns were prepared with an outside accountant, there was no independent auditor's statement and at that point Gourmet could not submit one. *Supplemental Questionnaire Response* (Mar. 9, 1998), at 1, P.R. Doc. 24, Pl.'s App., Tab 10, at 8. Commerce perceived a discrepancy in Gourmet's responses and asked Gourmet to explain why it had audited accounting records in previous reviews and not in the sixth review. *Supplemental Questionnaire* (Mar. 31, 1998), at 1, P.R. Doc. 28, Pl.'s App., Tab 11, at 3. The Department also asked Gourmet to explain why a verification in this POR would lead to a different result from previous reviews. *Id.* Gourmet explained that the confusion arose from an translation error, confusing the distinction in English between an auditor and an accountant. *Supplemental Questionnaire Response* (Apr. 3, 1998), at 2, P.R. Doc. 29, Pl.'s App., Tab 12, at 2. Although an accountant prepared Gourmet's tax returns, Gourmet did not conduct an audit of its financial statements. *Id.* Gourmet stated that such an audit was not required of it under Taiwanese law. *Id.* Because its tax returns were prepared with the assistance of an outside accountant, Gourmet had previously incorrectly stated that its financial statements were audited on a yearly basis. *Id.* Gourmet asserted that a verification in this review would differ from past reviews because Gourmet had hired the accounting firm of Diwan, Ernst & Young ("DE&Y") to conduct a special audit of its accounting records, and that DE&Y's findings would constitute independent substantiation of the data Gourmet had submitted. *Id.* at 4; *see Letter from DE&Y to Gourmet* (Mar. 17, 1998), at Ex. S–1, C.R. Doc. 4, P.R. Doc 26, Pl.'s App., Tab 16, at 6–7; *Letter from DE&Y to Gourmet* (May 18, 1998), at Ex. 1, C.R. Doc. 9, P.R. Doc. 42, Pl.'s App., Tab 18, at 7. Despite these responses by Gourmet to Commerce's questionnaires and the work performed by DE&Y, Commerce

determined that it could not reconcile the data Gourmet submitted in its questionnaire responses to its financial statements.[1] *Final Results*, 64 Fed. Reg. at 17,316. Commerce determined that Gourmet's responses were unverifiable and applied the highest available rate of 10.67 percent to Gourmet based on total adverse facts available. *Id.* at 17,316–17.

DISCUSSION

I. Verification

On the basis of information on the record, Commerce determined that Gourmet's accounting system and the information submitted in its questionnaire responses were unreliable. *Final Results*, 64 Fed. Reg. at 17,316. Commerce further determined that because Gourmet's submissions were not reconcilable to its financial statements, the information submitted was unverifiable and applied facts otherwise available. *Id.* Gourmet now challenges this determination.

Commerce's statutory mandate is to calculate antidumping duty margins as accurately as possible. *Rubberflex SDN. BHD. v. United States*, 59 F. Supp.2d 1338, 1346 (Ct. Int'l Trade 1999) (citation omitted). In order to satisfy this requirement, it is essential that a respondent provide Commerce with accurate, credible, and verifiable information. Where Commerce determines that information submitted in a questionnaire response is unverifiable, 19 U.S.C. §1677e(a)(2)(D)[2] authorizes Commerce, subject to 19 U.S.C. §1677m(d) (1994)[3], to substitute facts otherwise available. The use of facts available provides the "only incentive to foreign exporters and producers to respond to Commerce questionnaires" in antidumping and countervailing duty proceedings. Statement of Administrative Action, accompanying H.R. Rep. No. 103–826(I), at 868, *reprinted in* 1994 U.S.C.C.A.N. 3773, 4198 ("SAA").[4]

Gourmet argues that Commerce erred in determining that its questionnaire responses were unverifiable, based solely on the fact that Gourmet did not provide Commerce with audited financial statements. Gourmet insists that Commerce could have conducted a verification of its bank statements and tax returns, which it had allegedly independently substantiated, in place of audited financial statements.[5] Gourmet insists that Commerce's practice is to accept sources other than

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[1] Gourmet has acknowledged that it [ ]. Gourmet admits that [ ]. Gourmet admits that [ ]. *Futtner Memo.* (Oct. 7, 1998), at 1, C.R. Doc. 12, Pl.'s App., Tab 20, at 1.

[2] Section 1677e(a)(2) provides in relevant part:

> If * * * an interested party or any other person * * *
>
> (D) provides such information but the information cannot be verified as provided in section 1677m(i) of this title, the administering authority and the Commission shall, subject to section 1677m(d) of this title, use the facts otherwise available in reaching the applicable determination under this subtitle.

[3] Section 1677m(d) requires that Commerce provide respondents with an opportunity to remedy any submissions which Commerce determines to be deficient. *See* 19 U.S.C. § 1677m(d); *Ta Chen Stainless Steel Pipe, Ltd. v. United States*, No. 97–08–01344, 1999 WL 1001194, at *12 (Ct. Int'l Trade Oct. 28, 1999). Commerce provided Gourmet with repeated opportunities to establish that the information submitted was verifiable.

[4] The Statement of Administrative Action represents "an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round Agreements * * * The Administration understands that it is the expectation of the Congress that future Administrations will observe and apply the interpretations and commitments set out in this statement." SAA at 656, 1994 U.S.C.C.A.N. at 4040.

[5] Apparently, if Gourmet had provided audited financial statements, [ ]. *See* Gov't Br. at 28; Pl.'s Reply Br. at 12.

audited financial statements. In *Collated Roofing Nails from Taiwan*, 62 Fed. Reg. 51,427 (Dep't Commerce 1997) (notice of final determination of sales at LTFV) [hereinafter "*Collated Roofing Nails*"] Commerce stated that when a respondent does not have audited financial statements, the Department "may use the company's tax return as an independent source to substantiate the company's questionnaire responses." 62 Fed. Reg. at 51,427. The independent source, however, must be proven reliable and useable. In *Collated Roofing Nails*, Commerce was unable to reconcile one respondent's unaudited financial statement to its tax return, and therefore determined that the unaudited financial statements were unreliable and unusable, and therefore unverifiable. *Id.* at 51,427. For another respondent, the Department was able to reconcile unaudited financial statements with a tax return and determined that the information in the financial statements was reliable. *Id.* at 51,437. The Department had also stated in *Fresh Cut Flowers from Mexico*, 60 Fed. Reg. 49,569, 49,570 (Dep't Commerce 1995) (final results of antidumping duty admin. rev.) that respondents may be permitted to submit tax returns as independent substantiation of their questionnaire responses in the absence of audited financial statements. In that determination, Commerce found that without an explanation reconciling the data in respondent's tax returns with its financial statements, the tax returns could not be used to independently substantiate the reported sales and costs, rendering the entire questionnaire responses unusable. *Id.* The Department explained its practice in this review, stating that:

> The Department does not reject questionnaire responses simply because the respondent does not have an audited financial statement. In such situations, the Department looks to other financial records, *prepared for purposes independent of the antidumping proceeding*, such as tax statements, which attest to the veracity of a respondent's accounting system and information submitted to the Department.

Final Results, 64 Fed. Reg. at 17,316 (emphasis added).

Gourmet contends that it did independently substantiate the information in its questionnaire responses by hiring the outside accounting firm, DE&Y, to conduct a special audit of its financial system. Gourmet submits that DE&Y's findings constitute acceptable independent substantiation of the data Gourmet submitted. *See Supplemental Questionnaire Resp.*, (Apr. 3, 1998), at 4, P.R. Doc. 29, Def.'s App., Tab 6, at 4. DE&Y's "special audit," however, does not provide substantiation independent of the antidumping proceedings, which is what Commerce is seeking. Under the facts of this case, it was reasonable for Commerce to find that the audit done solely for the purposes of the antidumping proceeding was not sufficiently independent for the Department to be confident that it would be reconciling the cost and sales data.[6] Here, DE&Y qualified its review of Gourmet's records by stating that, "We did not

[6] [ ].

carry out an audit of Gourmet's management accounts or general ledger in accordance with generally accepted auditing standards." *Letter from DE&Y to Gourmet* (Mar. 17, 1998), Pl.'s App., Tab 16, at 6. Furthermore, DE&Y stated that "[i]n conducting our work we have relied on the Corporation's management accounts, general ledger and supporting documentation obtained from Gourmet. We therefore make no representation regarding the accuracy or completeness of such information." *Id.* As Commerce suggests, DE&Y simply took the information Gourmet provided it at face value.[7]

Commerce determined that Gourmet failed to demonstrate that the information which it placed on the record accurately reflected all of the relevant sales made by the company during the period of review and its cost of production. *Final Results*, 64 Fed. Reg. at 17,316. As DE&Y admitted, the work it performed did not constitute an audit of Gourmet's accounting system. *Letter from DE&Y to Gourmet*, at Ex. S–1, Pl.'s App., Tab 16, at 6. Its work was not itself substantiation prepared for purposes other than antidumping purposes nor was it an analysis of a reliable accounting system or records prepared for such purposes.[8] Commerce's determination that the alleged independent substantiation by DE&Y fell short of rendering Gourmet's questionnaire responses verifiable is reasonable and is supported by substantial evidence.[9] *Cf. Certain Preserved Mushrooms from Chile*, 63 Fed. Reg. 56,613, 56,616–17 (Dep't Commerce 1998) (notice of final determination of sales at LTFV) (where vast majority of respondents information was accurate and verifiable, and discrepancies were "specific and quantifiable," Department was able to reconcile reported costs to financial statements). In this case, there was no substantiation of Gourmet's data independent from the antidumping investigation. Therefore, Commerce's resort to facts otherwise available pursuant to 19 U.S.C. § 1677e(a)(2)(D) was in accordance with law.

II. Application of Total Adverse Facts Available

Gourmet also argues that Commerce's resort to adverse facts available is not supported by substantial evidence on the record and is not otherwise in accordance with law because Commerce failed to adhere to the statutory standard for applying adverse facts available. Following a determination that the use of facts available is authorized pursuant to

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[7] Having already determined that Gourmet's financial system [ ].

[8] In two book situations, moreover, it seems that in Commerce's view at least one set must be prepared for an independent purpose and be found reliable in order for the information to be of any use to Commerce.

[9] Gourmet complains that all that would have satisfied Commerce was a complete independent audit, and that this is beyond the requirements of the statute. *See, e.g.*, 19 U.S.C. § 1677b(f)(1)(A) (1994) (costs to be calculated on the basis of records kept by exporter or producer if records are kept in accordance with generally accepted accounting principles of exporting country). In light of [ ].

19 U.S.C. §1677e(a), subsection (b)[10] further permits Commerce to apply an adverse inference if Commerce makes the additional finding that "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information." 19 U.S.C. §1677e(b); *see also Borden, Inc. v. United States*, 4 F. Supp.2d 1221, 1246 (Ct. Int'l Trade 1998). In making its determination that a respondent has been uncooperative, Commerce is to consider the extent to which a party may benefit from its own lack of cooperation. SAA at 870, 1994 U.S.C.C.A.N. at 4199. Commerce is required to articulate the reasons for its conclusion that a party failed to act to the best of its ability prior to applying adverse facts available. *Mannesmannrohren-Werke AG v. United States*, 77 F. Supp.2d 1302, 1313–14 (Ct. Int'l Trade 1999). Commerce cannot simply repeat its facts available finding under 19 U.S.C. §1677e(a) to support its use of adverse facts available under 19 U.S.C. §1677e(b). *Ferro Union, Inc. v. United States*, 44 F. Supp.2d 1310, 1329 (Ct. Int'l Trade 1999).

In this case Commerce stated that the basis for the adverse finding was Gourmet's continued failure to provide verifiable data. *Final Results*, 64 Fed. Reg. at 17,316. Commerce stated:

> We believe that Gourmet has had sufficient notice of the Department's requirements for verifiable submissions and ample opportunity to provide information that is amendable to verification. Yet Gourmet has continued to provide unverifiable data. Therefore, we determine that Gourmet has failed to cooperate by not acting to the best of its ability, and thus we are using an adverse inference in our application of facts available.

Id. Unlike *Borden*, Commerce determined in this case that Gourmet had the ability to produce verifiable information and failed to do so. *Id.* ("In this case, Gourmet possesses relevant * * * financial statements.") That reasoning supports the Department's conclusion that Gourmet failed to comply to the best of its ability.

Gourmet insists that a finding that it failed to comply to the best of its ability because of its continued failure to provide verifiable information relies on an analysis of Gourmet's behavior in past reviews, which is not generally permitted. *See E.I. DuPont de Nemours & Co. v. United States*, No. 96–11–02509, 1998 WL 42598, at *11 (Ct. Int'l Trade Jan. 29, 1998) ("Commerce's longstanding practice, upheld by this court, is to treat each segment of an antidumping proceeding, including the antidumping investigation and the administrative reviews that may follow, as in-

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[10] Section 1677e(b) provides:

> If the administering authority or the Commission (as the case may be) finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority or the Commission, the administering authority or the Commission (as the case may be), in reaching the applicable determination under this subtitle, may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available. Such adverse inference may include reliance on information derived from—
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> (1) the petition,
> (2) a final determination in the investigation under this subtitle,
> (3) any previous review under section 1675 of this title or determination under section 1675b of this title, or
> (4) any other information placed on the record.

19 U.S.C. §1677e(b).

dependent proceedings with separate records and which lead to independent determinations.") (citation omitted). When Commerce is judging a party's ability to comply in the context of an administrative review, as opposed to an initial investigation, it is not inappropriate for Commerce to consider that party's past behavior.[11] Past participation may be relevant to notice, knowledge and reliance issues. This does not violate the independent nature of the proceedings, rather in the context of this case it acknowledges that Gourmet had participated in the investigation and several reviews and was familiar with Commerce's requirements.[12]

Normally Commerce may not require a party to change its accounting system or provide information which it simply does not have. *See Borden*, 4 F. Supp.2d at 1246–47. Commerce may, however, require a party to provide financial statements which are usable or suffer the consequences. Under appropriate factual circumstances, the failure to provide such statements can justifiably lead to the conclusion that a party failed to comply to the best of its ability.[13] Gourmet argues, however, that it did not have sufficient notice of what type of information would satisfy Commerce, and that Commerce should have told Gourmet from the outset that in this case only audited financial statements would suffice, so that Gourmet could avoid the expense of hiring DE&Y. Commerce's initial questionnaire asked for audited and unaudited financial statements. *See Questionnaire Response* (Dec. 23, 1997), at A–12, P.R. Doc. 13, Def.'s App., Tab 1, at 2. The supplemental questionnaire further stated: "*Unless there are compelling reasons not to do so*, it is generally the Department's practice to reconcile questionnaire responses to audited financial statements." *Supplemental Questionnaire* (Feb. 11, 1998) at 1, P.R. Doc. 17, Pl.'s App., Tab 9, at 3 (emphasis added). It was in response to this questionnaire that Gourmet informed Commerce of the special audit being performed by DE&Y. *Response to Supplemental Questionnaire* (Mar. 9, 1998) at 1, P.R. Doc. 24, Pl.'s App., Tab 10 at 8. Gourmet thus incurred the expense of hiring DE&Y prior to presenting Commerce with this alternate form of attempted substantiation. The Department alleges, however, that it could not know whether the special audit would constitute independent substantiation until it saw the results of DE&Y's work. For its part, Gourmet should have known that Commerce's preference was to substantiate with audited financial statements, and that "independent" meant information independent of the antidumping investigation. Because the DE&Y audit was not a full scale audit, and was not sufficiently independent, Commerce found the special audit insufficient.

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[11] The test of Gourmet's ability to comply might have rendered different results if Gourmet had made these efforts in an original investigation. In that case, its ability to comply would likely be measured against current capacity to comply without judging the past behavior which rendered it unable to comply. This is not the situation before the court.

[12] It was within Gourmet's ability to provide relevant financial information. *Final Results*, 64 Fed. Reg. at 17,316. Apparently, the only reason it did not provide audited statements was because [ ].

[13] [ ].

Although Gourmet responded to Commerce's questionnaires, it did not provide the kind of information Commerce required to verify the questionnaire responses. In light of the fact that it was within Gourmet's capacity to provide the right kind of information, Commerce's determination that Gourmet failed to comply to the best of its ability is in accordance with law and supported by substantial evidence.

CONCLUSION

For the foregoing reasons, the Court finds that Commerce correctly applied 19 U.S.C. §§ 1677e(a)(2)(D) and 1677e(b). Accordingly, the *Final Results* are affirmed in their entirety.

(Slip Op. 00–79)

UNITED STATES, PLAINTIFF *v.* JOSEPH ALMANY, D/B/A J.A. IMPORTS, DAVID JORDAN, INC., AND FAR WEST INSURANCE CO., DEFENDANTS

Court No. 96–02–00384

(Dated July 7, 2000)

FINAL JUDGMENT

MUSGRAVE, *Judge:* On May 23, 2000, Defendants Joseph Almany, d/b/a J.A. Imports, and David Jordan Inc. were ordered to show cause why judgment should not be granted in favor of The United States of America by June 23, 2000. No response has been received within the time allowed by rule or order. In prior proceedings, Defendants Joseph Almany and David Jordan, Inc. were determined jointly and severally liable for a fraud penalty as a result of violations of 19 U.S.C. § 1592(a). The maximum penalty for such violations is equivalent to the domestic value of the merchandise, which in this case the government has adduced as US$258,311.56. There being no rebuttal, it is hereby:

ORDERED that Defendants Joseph Almany and David Jordan, Inc. are jointly and severally liable to Plaintiff, The United States of America, for a civil penalty resulting from fraudulent violations of 19 U.S.C. § 1592 in the amount of US$258,311.56, plus interest.

(Slip Op. 00–80)

FAG KUGELFISCHER GEORG SCHÄFER AG, FAG ITALIA S.P.A., BARDEN CORP. (U.K.) LTD., FAG BEARINGS CORP., AND BARDEN CORP., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND TORRINGTON CO., DEFENDANT-INTERVENOR

Court No. 99–08–00465

Plaintiffs, FAG Kugelfischer Georg Schäfer AG, FAG Italia S.p.A., Barden Corporation (U.K.) Ltd., FAG Bearings Corporation and The Barden Corporation (collectively "FAG"), move pursuant to USCIT R. 56.2 for judgment upon the agency record challenging a finding of the United States Department of Commerce, International Trade Administration's ("Commerce") final determination, entitled *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Sweden, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews*, 64 Fed. Reg. 35,590 (July 1, 1999).

In particular, FAG argues that Commerce erred in using aggregate data of all foreign like products under consideration for normal value in calculating profit for constructed value ("CV") under 19 U.S.C. § 1677b(e)(2)(A) (1994). FAG asserts that if Commerce intends to calculate CV profit on such an aggregate basis, it must do so under the alternative methodology of § 1677b(e)(2)(B)(i).

Commerce responds that it properly calculated CV profit pursuant to § 1677b(e)(2)(A). The Torrington Company agrees with Commerce's methodology for calculating CV profit.

Held: FAG's USCIT R. 56.2 motion is denied. Commerce's final determination is affirmed in all respects.

[FAG's motion is denied. Case dismissed.]

(Dated July 7, 2000)

Grunfeld, Desiderio, Lebowitz & Silverman LLP (Max F. Schutzman, Andrew B. Schroth and *Mark E. Pardo)* for plaintiffs.

David W. Ogden, Acting Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Velta A. Melnbrencis*, Assistant Director); of counsel: *David R. Mason*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, for defendant.

Stewart and Stewart (Terence P. Stewart, Wesley K. Caine, Geert De Prest and *Lane S. Hurewitz)* for defendant-intervenor.

OPINION

TSOUCALAS, *Senior Judge:* Plaintiffs, FAG Kugelfischer Georg Schäfer AG, FAG Italia S.p.A., Barden Corporation (U.K.) Ltd., FAG Bearings Corporation and The Barden Corporation (collectively "FAG"), move pursuant to USCIT R. 56.2 for judgment upon the agency record challenging a finding of the Department of Commerce, International Trade Administration's ("Commerce") final determination, entitled *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Sweden, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews* ("*Final Results*"), 64 Fed. Reg. 35,590 (July 1, 1999).

BACKGROUND

This case concerns the ninth administrative review of 1989 antidumping duty orders on antifriction bearings (other than tapered roller

bearings) and parts thereof imported from several countries, including Germany, Italy and the United Kingdom, for the period of review covering May 1, 1997 through April 30, 1998. In accordance with 19 C.F.R. § 351.213 (1998), Commerce initiated the administrative reviews of these orders on June 29, 1998, *see Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 63 Fed. Reg. 35,188, and published the preliminary results of the subject reviews on February 23, 1999,[1] *see Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Rescission of Administrative Reviews* ("*Preliminary Results*"), 64 Fed. Reg. 8790. Commerce published the *Final Results* on July 1, 1999. *See* 64 Fed. Reg. at 35,590.

JURISDICTION

The Court has jurisdiction over this matter pursuant to 19 U.S.C. § 1516a(a) (1994) and 28 U.S.C. § 1581(c) (1994).

STANDARD OF REVIEW

In reviewing a challenge to Commerce's final determination in an antidumping administrative review, the Court will uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (1994).

DISCUSSION

I. Commerce's CV Profit Calculation

A. Background

For this review, Commerce used constructed value ("CV") as the basis for normal value ("NV") "when there were no usable sales of the foreign like product in the comparison market." *Preliminary Results*, 64 Fed. Reg. at 8795. Commerce calculated the profit component of CV using the statutorily preferred methodology of 19 U.S.C. § 1677b(e)(2)(A).[2] *See Final Results*, 64 Fed. Reg. at 35,611. In applying the preferred methodology for calculating CV profit, Commerce determined that "an aggregate calculation that encompasses all foreign like products under consideration for normal value represents a reasonable interpretation of [§ 1677b(e)(2)(A)]" and "the use of [such] aggregate data results in a reasonable and practical measure of profit that [Commerce] can apply consistently where there are sales of the foreign like product in the ordinary course of trade." *Id.*

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[1] Since the administrative review at issue was initiated after December 31, 1994, the applicable law in this case is the antidumping statute as amended by the Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994) (effective Jan. 1, 1995).

[2] Specifically, in calculating constructed value, the statutorily preferred method is to calculate an amount for profit based on "the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review * * * in connection with the production and sale of a foreign like product [made] in the ordinary course of trade, for consumption in the foreign country." 19 U.S.C. § 1677b(e)(2)(A) (1994).

B. Contentions of the Parties

FAG argues that Commerce's use of aggregate data encompassing all foreign like products under consideration for NV in calculating CV profit is contrary to § 1677b(e)(2)(A) and to the explicit hierarchy established by § 1677(16) for selecting "foreign like product" for the CV profit calculation. *See* Pls.' Br. Supp. Mot. J. Agency R. at 2, 4–10; Pls.' Reply Br. at 2–8. FAG asserts that if Commerce intends to calculate CV profit on such an aggregate basis, it must do so under the alternative methodology of § 1677b(e)(2)(B)(i). *See* Pls.' Br. Supp. Mot. J. Agency R. at 9–10.

Commerce responds that it properly calculated CV profit pursuant to § 1677b(e)(2)(A) based on aggregate profit data of all foreign like products under consideration for NV. *See* Def.'s Mem. in Opp'n to Pls.' Mot. J. Agency R. at 3–26. The Torrington Company agrees with Commerce's CV profit calculation. *See* Torrington's Resp. to Pls.' Mot. J. Agency R. at 5–13.

C. Analysis

In *RHP Bearings Ltd. v. United States*, 23 CIT ____, 83 F. Supp. 2d 1322 (1999), this Court upheld Commerce's CV profit methodology of using aggregate data of all foreign like products under consideration for NV as being consistent with the antidumping statute. *See id.* at ____, 83 F. Supp. 2d at 1336. Since FAG's arguments and the CV profit methodology at issue in this case are practically identical to those presented in *RHP Bearings*, the Court adheres to its reasoning in *RHP Bearings* and, therefore, finds that Commerce's CV profit methodology is in accordance with law.

Conclusion

For the foregoing reasons, Commerce's final determination is affirmed in all respects. Case is dismissed.

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